Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

REFCO, INC.,

Petitioner,

– against –

THE COMMITTEE OF RECEIVERS FOR A.W. GALADARI, and THE EMIRATE OF DUBAI, UNITED ARAB EMIRATES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Second Circuit's interpretation of the third clause of the commercial activity exception to foreign sovereign immunity, under 28 U.S.C. § 1605(a)(2), conflicts with the plain meaning of § 1605(a)(2), which provides that a foreign state is not immune from suit based upon an offensive *act* outside the United States that is effected "*in connection with a commercial activity* elsewhere" and "*that act* causes a direct effect in the United States," yet the Second Circuit held that it is insufficient for the injurious *act* to be *in connection with* a commercial activity and that, to fall within the exception, the offensive *act* itself must be *commercial activity* and the *commercial activity* must cause a direct effect in the U.S.

2. Whether the Second Circuit erroneously interpreted the waiver exception to foreign sovereign immunity under 28 U.S.C. § 1605(a)(1), which provides that a foreign state shall not be immune from jurisdiction in any case in which it has waived its immunity "either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect ...," to require a showing that the foreign state subjectively intended to waive immunity, even where its objective conduct demonstrates an implicit waiver.

PARTIES TO THE PROCEEDING

The caption of the case in this Court does not contain the names of all parties. The parties in the circuit court included The Drexel Burnham Lambert Group Inc. ("Drexel"), which is simultaneously filing a separate petition for a writ of certiorari to review the same decision of the Second Circuit. The parties in the district court included defendants A.W. Galadari ("Galadari") and A.W. Galadari Commodities ("Commodities"), who have answered the amended and supplemental complaint, and defendant A.W. Galadari Holdings (Private) Ltd. ("Holdings"), which has not appeared.

Petitioner Refco, Inc. has no subsidiary companies, and its parent is Refco Group, Ltd.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner Refco, Inc. ("Refco") respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit, entered on November 29, 1993.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (App. 1a-30a) is reported at 12 F.3d 317 (2d Cir. 1993). The opinion of the United States District Court for the Southern District of New York (App. 33a-72a) is reported at 810 F. Supp. 1375 (S.D.N.Y. 1993).

JURISDICTION

The circuit court entered its decision on November 29, 1993. The decision of the circuit court reversed the order of the district court, which, *inter alia*, denied respondents' motions to dismiss the amended and supplemental complaints of Refco and Drexel, and held that it had subject matter jurisdiction over the claims against respondents the Emirate of Dubai, United Arab Emirates (the "Emirate") and the Committee of Receivers (the "Committee") under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602, *et seq.* (1976) ("FSIA"). Jurisdiction in the court of appeals rested upon the "collateral order doctrine." App. 13a (citing *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545-47 (1949)).

The jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1) (1988).

STATUTORY PROVISIONS INVOLVED

The FSIA, 28 U.S.C. §§ 1602-1611, provides in relevant part as follows:

§ 1603. Definitions.

For purposes of this chapter --

* * * *

> (d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

§ 1604. Immunity of foreign state from jurisdiction.

> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune

from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

§ 1605. General exception to the jurisdictional immunity of a foreign state.

(a) A foreign state shall not be immune from th jurisdiction of courts of the United States or of the States in any case --

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

STATEMENT OF THE CASE

This action arises from Refco's attempt to recover the debts of Galadari and his company Commodities. The debts arose in 1983 from commodities trading. Respondents, the Emirate and the Committee, are alleged to be the successors to Galadari and his businesses as a result of their takeover, management and/or liquidation of Galadari's businesses in the Emirate of Dubai. A majority of the Second Circuit panel dismissed the amended and supplemental complaints of Refco and Drexel as a result of an erroneous construction of the third clause of the commercial activity exception to foreign sovereign immunity under § 1605(a)(2), as well as the waiver exception under § 1605(a)(1).

In analyzing the commercial activity exception, the Second Circuit majority agreed with the district court that respondents' activities in taking over, managing and liquidating Galadari's assets might be regarded as commercial activities. App. 24a. The facts as found by the district court make clear that the acts which form the bases of petitioners' claims -- the repudiation of the debts -- relate directly to the Emirate's and the Committee's acknowledged commercial conduct -- marshalling, operating and, in some cases, liquidating Galadari's assets and businesses. The appellate court's majority held, however, that these commercial activities "are not activities that 'cause[d] a direct effect in the United States,' § 1605(a)(2), upon which the claims of Drexel and Refco are based." *Id.* The majority found that the "gravamen" of petitioners' claims concerns the "judicial role of the Committee in marshalling the assets of Galadari and Commodities and adjudicating the claims of their creditors ... and not any of the tangentially related commercial conduct in which the Committee or the Emirate might have engaged." App. 24-25a. In reaching its conclusion, the majority expressly rejected petitioners' showing that the plain language of the third clause of § 1605(a)(2) "requires only that the foreign act that causes a direct effect in the United States occur 'in connection with' a commercial activity." App. 25a. The majority stated that it does not read the Supreme Court's ruling in *Saudi Arabia v. Nelson*, 113 S. Ct. 1471 (1993) and *Republic of Argentina v. Weltover*, 112 S. Ct. 2160 (1992) to support petitioners' construction of § 1605(a)(2). App. 26a.

As shown below, this Court should grant certiorari to review the Second Circuit's decision because it improperly rewrites the plain language of the statute in effect requiring that the claim be based, not upon an act "in connection with" commercial activity, but upon a commercial activity itself. This Court should grant certiorari also to review the Second Circuit decision with respect to the commercial activity exception for the further reason that the decision conflicts with decisions of the Third, Ninth and Eleventh Circuits, which have interpreted § 1605(a)(2).

The Second Circuit's interpretation of the waiver exception to foreign sovereign immunity -- § 1605(a)(1) -- also conflicts

with the statute's plain meaning. The Second Circuit did not dispute the district court's finding that the Committee appeared generally in the Drexel action and asserted 25 affirmative defenses without asserting foreign sovereign immunity and that the Committee appeared in the Refco action and opposed Refco's motion for an order of attachment without raising the issue of sovereign immunity. App. 15-16a. Nevertheless, the Second Circuit held that the Committee's conduct did not constitute an implicit waiver of immunity because the Committee subsequently stated in the Drexel action that it might in the future assert an immunity defense and later asserted the defense in the Refco state court action, as well as in motions to dismiss the amended and supplemental complaints in the district court. The Second Circuit found that the Committee, therefore, had not impliedly intended to waive immunity. The Second Circuit's decision, which relies exclusively upon conduct which occurred long after the Committee elected to appear and participate in litigation without asserting an FSIA defense, contravenes the plain language of § 1605(a)(1) which declares that a waiver occurs "either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect ..."

Galadari and his companies. In the early 1980's, Galadari owned and operated a number of businesses, including Holdings, which conducted extensive operations in and outside Dubai. Through Holdings, Galadari owned 46 percent of the Union Bank of the Middle East ("Union Bank"), now known as the Emirates International Bank, Ltd. Galadari traded commodities, both for his own account and on behalf of customers. Galadari and Commodities conducted commodities trading during 1982 and 1983 through accounts with Refco and Drexel. Galadari and Commodities lost tens of millions of dollars while trading on U.S. commodities exchanges through accounts with Refco and Drexel, which covered the losses. Refco holds a July 1983 letter agreement that acknowledges a debt of more than $6 million owed by Galadari and Commodities. Refco was paid $1.5 million of the debt and the undisputed remaining principal debt owed to Refco is more than $4.6 million. Drexel also is the holder of a note executed by Galadari, acknowledg-

ing commodities trading debts owed to Drexel, pursuant to which Drexel admittedly is owed over $12.4 million.

The Emirate and its creation of the Committee. In November 1983, the Emirate seized Galadari's assets, including Holdings and Commodities, and jailed Galadari. In a November 1983 decree, the Emirate appointed a provisional board to assume control of Galadari's assets and to operate the Union Bank. Drexel sought repayment from the provisional board of the note executed by Galadari. The provisional board chairman appointed by the Emirate told Drexel its claim represented "gambling losses" and, therefore, did not merit payment. App. 28a (Newman, C.J., dissenting), 57a n.19.

In April 1984, the Emirate took over ownership of the Union Bank by purchasing the Union Bank shares that had belonged to Holdings. *Drexel v. Galadari*, 777 F.2d 877, 879 (2d Cir. 1985). The Emirate also increased the capital of the bank by purchasing unissued shares and extending a substantial line of credit. The Emirate now owns 80 percent of the Union Bank.

As the district court found (App. 37-38a), and as the dissenting opinion of the circuit court noted (App. 28a), in an April 1984 decree, the Emirate appointed the Committee to serve in dual capacities with respect to Galadari and his business. On the one hand, the decree designated the Committee as the successor to the provisional board of the Union Bank and vested the Committee with the authority to take custody of and operate all of Galadari's non-banking assets. On the other hand, the decree vested the Committee with the authority to liquidate the assets and to determine and pay creditors' claims. Since 1984, the Committee has continued to operate some Galadari companies, including Holdings, and has liquidated others. The Emirate continues to own and operate the Union Bank, which is the largest single claimant to the Galadari assets, representing approximately 90 percent of the claims.

Refco and Drexel submitted their claims against Galadari and Commodities to the Committee in July 1984. *Drexel v. Galadari*, 127 B.R. 87, 90 (S.D.N.Y. 1991). Refco and Drexel contend that Holdings was responsible for the unpaid debts of

Commodities. Commodities was, like many other Galadari businesses, a division of Holdings, as evidenced by, *inter alia*, the 1982 audited accounts for Holdings which list Commodities as one of Holdings' wholly-owned unincorporated divisions. *Drexel v. Galadari*, 134 B.R. 719, 721-724 (S.D.N.Y. 1991).

The Refco action. In August 1984, Refco commenced an action against Galadari and Commodities in New York state court. The Committee voluntarily appeared and participated in the action as the real party in interest. The Committee opposed Refco's motion for an order of attachment, argued the merits of Refco's claims and sought affirmative relief from the court. In recognition of the Committee's party status, the state court added the Committee as a defendant in 1985. Thereafter, in a belated and ineffective attempt to retract its waiver of immunity, the Committee asserted a claim of immunity in a motion to dismiss that was subsequently withdrawn without prejudice.

In an action commenced by Drexel, the Committee appeared and litigated for over seven years without asserting sovereign immunity. After a hearing directed by the circuit court on whether the "unchartered territory" of the Dubai proceedings was entitled to comity deference, the district court, in January 1987, extended comity to the Dubai proceedings and the Drexel action was stayed. *Drexel v. Galadari*, No. 84 Civ. 2602 (CBM), 1987 U.S. Dist. LEXIS 5030 (S.D.N.Y. Jan. 29, 1987).

During 1985-1990, in consideration of the Committee's promises, that, if Refco agreed not to pursue its New York action, Refco's claim would be considered together with and the same as Drexel's, and Refco could rely on the Committee's dealings with Drexel as if the Committee were dealing directly with Refco, Refco agreed continuously to adjourn its action in favor of the Dubai proceedings. In January 1990, Refco refused to grant the Committee any further adjournments. *Drexel*, 127 B.R. at 90-94. After treating Refco together with and the same as Drexel for six years, the Committee removed Refco's action to the district court and had it consolidated with the Drexel action and stayed. *Refco, Inc. v. Galadari*, 755 F. Supp. 79, 84 (S.D.N.Y. 1991).

In 1991, the district court found that the Dubai proceedings were no longer entitled to comity deference because the Committee had denied petitioners due process by, among other things, fabricating issues against Drexel's and Refco's claims and orchestrating an expert opinion holding that Commodities was not a division of Holdings. The district court further held that these actions were taken as part of a campaign to repudiate Refco's and Drexel's claims. *Drexel*, 134 B.R. at 722-25; *Drexel*, 127 B.R. at 95-100. Thereafter, the Committee conceded the validity of Refco's and Drexel's claims as against Galadari and Commodities, but refused to pay the claims on the purported basis that Commodities was not a division of Holdings and neither Commodities nor Galadari had assets to pay the claims. In June 1991, the district court lifted the stays and allowed Refco and Drexel to pursue their claims in the district court upon the grounds that any appellate proceeding available to Refco and Drexel in Dubai also would be fundamentally unfair and Refco's counsel had been denied entry into Dubai because he was born in Israel. In January 1992, the district court granted Refco's and Drexel's motions to amend and supplement their complaints.

The District Court held that subject matter jurisdiction exists under the commercial activity and waiver exceptions to foreign sovereign immunity pursuant to the Foreign Sovereign Immunities Act. The Committee and the Emirate moved to dismiss the amended and supplemental complaints of Refco and Drexel, asserting, *inter alia*, that the district court lacked subject matter jurisdiction because the Emirate and the Committee were entitled to sovereign immunity under the FSIA. The Emirate and the Committee moved also to stay discovery. The motions were made prior to Refco ever having the opportunity to conduct any discovery, including discovery on the jurisdictional issues. The district court denied the motions to dismiss, holding that subject matter jurisdiction was present under the commercial activity and waiver exceptions of the FSIA.

In a well-reasoned opinion, the district court correctly held that Refco's and Drexel's claims for nonpayment of the original debts met the third clause of § 1605(a)(2). The court analyzed

the third clause separately focusing on each of the three elements, as did the Court in *Republic of Argentina v. Weltover, Inc.*, 112 S. Ct. 2160, 2164 (1992). App. 58-59a. First, the court found that the relevant acts upon which petitioners' claims were based occurred "outside the territory" of the U.S., thereby "satisfying the first aspect of the requirements of the third clause of the commercial activity exception." App. 57a. Second, the district court found that the relevant acts were "taken *in connection with* a commercial activity" outside of the U.S. *Id.* The court followed the mandate set forth by this Court in *Weltover*, 112 S. Ct. at 2165, and looked to the nature of the conduct to determine that the Emirate's takeover and management of the Union Bank and the Committee's management and winding up of Galadari's non-banking businesses were commercial activities. The court found that these acts "could have been conducted by a private party" and, indeed, were performed previously by Galadari. App. 58a. The court then determined that the requisite nexus between the "acts" upon which petitioners' claims were based and the "commercial activity" was met. Respondents' repudiation of the debts to Refco and Drexel were taken in connection with respondents' take over of Galadari and his assets. Third, the court found that the "acts" of the Emirate and the Committee -- the repudiation of the debts -- had a direct effect in the U.S. because, as in *Weltover*, the situs of the debts is in the U.S. App. 59a. The court aptly concluded that "[w]hen [the Emirate] and the Committee took over the control and management of Galadari's assets and refused to pay debts owed Drexel and Refco and payable in the United States, [the Emirate] and the Committee produced a "direct effect" in the United States." *Id.*

The district court also ruled that the Committee was the real party in interest with respect to Galadari and his businesses, and that the Committee's appearance and participation in the actions constituted an implied waiver of foreign sovereign immunity. App. 50-52a. The court found that the Committee's general appearance and answer without an immunity assertion in the Drexel action constituted a waiver of immunity. The court found a waiver of immunity also in the Committee's

appearance and opposition to Refco's motion for an order of attachment without raising the issue of immunity. In that connection, the court noted the Committee's success in obtaining Refco's agreements to adjourn its action based on the Committee's representations that Refco would be treated the same as Drexel. App. 51a.

The Second Circuit majority held that the third clause of the commercial activity exception under § 1605(a)(2) did not apply because the "gravamen" of petitioners' claims was not commercial activities of the foreign state. As shown below, the circuit court improperly interpreted the plain language of the third clause of § 1605(a)(2), which denies foreign sovereign immunity to claims based upon "an act" outside of the U.S. taken "*in connection with* a commercial activity elsewhere" and "that act causes a direct effect in the United States."

The Second Circuit majority held also that the waiver exception under § 1605(a)(1) did not apply because, despite the Committee's objective conduct evidencing a waiver, the Committee did not intend to waive foreign sovereign immunity. The Second Circuit disregarded the Committee's extensive participation in the Drexel action and the fact that the Committee opposed Refco's injunction motion without asserting its immunity holding that, despite these facts, the Committee did not intend to waive immunity.

The Chief Judge of the Second Circuit dissented from the majority opinion stating that "[I]t is premature and unfair to dismiss this complaint at this time." App. 30a. The dissent opined that "the Court has ordered the dismissal, at the pleading stage, of a lawsuit that presents novel and subtle issues concerning complicated financial maneuvering in the Emirate of Dubai...." App. 27a. The dissent criticized the majority's conclusion that the "*gravamen* of these claims *concerns* the essentially judicial role of the Committee...." App. 29-30a (emphasis in original). Recognizing "the dual nature of the Committee's activities" as serving in both "quasi-judicial" and "commercial" capacities, the dissent found that, upon the present pleadings and record, it is not possible to

determine whether the Committee's particular actions that caused petitioners' injury were "judicial" or "commercial" in nature:

> Perhaps the Committee "adjudicated" the claims of Drexel and Refco and denied them, acting like a United States bankruptcy judge. But it is also possible that the Committee, acting like a successor corporation, used fresh cash from its "parent" entity to prefer some of its creditors and simply reneged on an enforceable obligation to discharge liabilities to [Refco and Drexel].

App. 30a. Under the dissent's analysis Refco and Drexel should be given the opportunity to prove their allegations that the acts which form the bases of the claims were performed in connection with respondents' commercial activities. As shown below, such a connection is sufficient under the plain language of the third clause of § 1605(a)(2).

REASONS FOR GRANTING THE PETITION

1. The Decision Below is Contrary to the Plain Language of § 1605(a)(2) -- the Commercial Activity Exception to Foreign Sovereign Immunity.

The Second Circuit's decision misapplies the plain language of the third clause of § 1605(a)(2) in two fundamental respects. The court below erroneously determined that the "acts" upon which petitioners' claims are based must be solely the "commercial activity of the foreign state elsewhere." App. 21-25a. The court below also erroneously held that petitioners were required to establish that the direct effect in the U.S. was caused by commercial activity of the Emirate and the Committee, and not, as the statute's plain language provides, by an act "in connection with" the commercial activity. This Court should grant certiorari to review the important federal question which has been decided by the Second Circuit in a manner contrary to the plain language of the statute. In addition, the Second Circuit's interpretation of the phrase "in connection with a commercial activity" of § 1605(a)(2) has created a conflict among the circuit courts.

It is a fundamental tenet of statutory construction that statutory language is to be interpreted in accordance with its plain meaning. This Court recently reiterated this principle unequivocally and without dissent: "[w]e have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete'." *Connecticut Nat'l Bank v. Germain*, 112 S. Ct. 1146, 1149 (1992) (citations omitted).

This Court's decision in *Saudi Arabia v. Nelson*, 113 S. Ct. 1471 (1993) confirmed that § 1605(a)(2), like other statutes, is to be given its plain meaning. In determining the interpretation to be accorded to the first clause of § 1605(a)(2), this Court distinguished the way in which the phrase "the action is based upon" is used in the first clause from its use in the second and third clauses:

> What the natural meaning of the phrase "based upon" suggests, the context confirms. ... we noted that § 1605(a)(2) contains two clauses following the one at issue here. The second allows for jurisdiction where a suit "is based ... upon an act performed in the Untied States in connection with a commercial activity of the foreign state elsewhere," and the third speaks in like terms, allowing for jurisdiction where an action "is based ... upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." *Distinctions among descriptions juxtaposed against each other are naturally understood to be significant, ... and Congress manifestly understood there to be a difference between a suit "based upon" commercial activity and one "based upon" acts performed "in connection with" such activity. The only reasonable reading of the former term calls for something more than a mere connection with, or relation to, commercial activity.*

113 S. Ct. at 1477-78 (citations and footnotes omitted; emphasis added). Thus, while the Court interpreted the first clause of § 1605(a)(2), this Court distinguished the more stringent requirements imposed by the first clause of § 1605(a)(2) from the more lenient requirements of the second and third clauses, which require only that the act sued upon have a "mere connection with, or relation to, commercial activity." 113 S. Ct. at 1478; *see also Weltover v. Republic of Argentina*, 941 F.2d 145, 151 (2d Cir. 1991) (commercial activity for purposes of the third clause focuses "on the nature of the underlying activity, rather than on the nature of the last act, *i.e.*, the breach"), *aff'd*, 112 S. Ct. 2160 (1992).

Certiorari should be granted because, despite the plain language of the statute and this Court's observations in *Nelson*, the circuit court expressly rejected petitioners' argument that the third clause of § 1605(a)(2) requires only that the act which forms the basis of petitioners' claims occur "in connection with" a commercial activity. App. 25-26a. The circuit court dismissed the amended and supplemental complaints as against the Emirate and the Committee on the ground that the acts of the Emirate and the Committee of which petitioners complain were not themselves solely commercial in nature, but, rather, were acts taken in relation to commercial activity:

> The gravamen of [petitioners'] claims concern the essentially judicial role of the Committee ... and not any of the tangentially related commercial conduct in which the Committee or the Emirate might have engaged.
>
> * * *
>
> The "acts" upon which the claims of Drexel and Refco are "based" are essentially the adverse determination of their claims by the Committee, including the determination that Galadari had not effectively pledged Union shares to Drexel as security for payment of the Note. As the Court stated in *Nelson*, the phrase "based upon" is "read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the

> case." 113 S. Ct. at 1477 (collecting cases). If the "connection" language of § 1605(a)(2) were read, as Drexel and Refco seek, to include tangential commercial activities to which the "acts" forming the basis of the claim have only an attenuated connection, the "commercial activity" exception would effectively be rewritten to authorize the exercise of jurisdiction over acts that are essentially sovereign in nature.

App. 25a (footnote omitted; citations omitted).

The effect of the Second Circuit's misinterpretation of the statute is to impose an additional requirement for pleading a claim under the third clause of § 1605(a)(2) that is not found in the plain language of the statute. Under the Second Circuit's analysis, a court does not have subject matter jurisdiction under the third clause of § 1605(a)(2) unless the act outside the territory of the United States which forms the basis of a plaintiff's claim is commercial in nature. The Second Circuit, in effect, has revised § 1605(a)(2) to read that "a foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case ... in which the action is based ... upon a *commercial act* outside the territory of the United States *in connection with a commercial activity of the foreign state* elsewhere ..." Such is plainly not the result intended by Congress where the statute unambiguously refers to "*an act* outside the territory of the United States" and *not* to "a commercial act." In the alternative, the Second Circuit effectively has deleted the clause "an act outside the territory of the United States in connection with" from the statute and thereby altered the third clause to read "[an] action based ... upon a commercial activity of the foreign state elsewhere."

The Second Circuit's deletion of, or addition to, portions of the statute is impermissible. "The cardinal principal of statutory construction is to save and not to destroy. It is our duty 'to give effect, if possible, to every clause and word of a statute.'" *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (citations omitted); *see also Freytag v. C.I.R.*, 111 S. Ct. 2631, 2638 (1991) (expressing "'a deep reluctance to interpret

a statutory provision so as to render superfluous other provisions in the same enactment'") (citations omitted).

The circuit court's expressed concern that, if the statute were to be given its plain meaning, the commercial activity exception would authorize the exercise of jurisdiction over "essentially sovereign acts" with only an "attenuated connection" to "commercial activity" is unfounded. App. 25a. As this Court noted in *Nelson*, not even the first clause of § 1605(a)(2) requires that a plaintiff's claim be based solely upon commercial acts, without any element of sovereign conduct. 113 S. Ct. at 1478 n.4. Thus, it follows that the third clause, which expressly allows for claims based upon an act that has a more relaxed link to commercial activity, does not require that the claim be based solely upon commercial activities. Indeed, nothing in the third clause requires that the *act* upon which the claim is based be commercial. Rather, the act -- which may be sovereign -- need only occur *in connection with* commercial activity. *See, e.g., Weltover*, 941 F.2d at 151 (finding that jurisdiction existed over the government of Argentina where Argentina's sovereign act of rescheduling certain debts was taken in connection with commercial activity).

Furthermore, in the instant case, the facts as found by the district court make clear that the acts which form the bases of petitioners' claims -- the repudiation of the debts -- relate directly to the Emirate's and the Committee's acknowledged commercial conduct -- marshalling, operating and, in some cases, liquidating Galadari's assets and businesses. The Emirate infused cash into Union Bank in an effort to reorganize and to pay creditors, and the Committee carried on the business of Holdings and paid 80% of its creditors. As part and parcel of their takeover of Galadari's businesses, respondents reneged on their obligations to pay petitioners' commercial debts. The Committee's repudiation of Refco's and Drexel's claims necessarily freed up substantial funds for distribution to the Union Bank, the Emirate and other creditors. *See* App. 30a (Newman, C.J., dissenting). Indeed, the Second Circuit's determination that the Committee's refusal to pay the debts was solely sovereign in nature was erroneous. A private individual or entity could have stepped into Galadari's shoes, as did the

Emirate and the Committee, and preferred some creditors and refused to pay others.

The Second Circuit erred for the further reason that, as Chief Judge Newman declared in his dissent, "it is premature and unfair to dismiss [the] complaint[s] at this time. *Id.* The Chief Judge further observed that "I would give the plaintiffs and opportunity to develop evidence to show that their interpretation of the events is correct." *Id.* Where, as here, an issued exists as to the defendants' claim of immunity, a plaintiff should be given the opportunity to conduct discovery with respect to the jurisdictional issues. *See Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 713 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1812 (1993) ("[t]o the extent that the jurisdictional facts are disputed on remand, the parties should be allowed to conduct discovery for the limited purpose of establishing jurisdictional facts before the claims can be dismissed); *Filus v. Lot Polish Airlines*, 907 F.2d 1328, 1332 (2d Cir. 1990), *on remand*, 87 CV 4252, 1992 U.S. Dist. LEXIS 10423 (E.D.N.Y. July 2, 1992); *Alliance of Am. Ins. v. Cuomo*, 854 F.2d 591, 597 (2d Cir. 1988) ("[b]efore dismissing a case for want of jurisdiction, a court should permit the party seeking the court's intervention to engage in discovery of facts supporting jurisdiction") (citations omitted); *see also Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 451 (6th Cir. 1988); *McKesson Corp. v. Islamic Republic of Iran*, 138 F.R.D. 1, 2 (D.D.C. 1991).

The Second Circuit further misinterpreted the plain language of § 1605(a)(2) when it held that:

> In the present case, the district court concluded that the third clause of § 1605(a)(2) applied because "[w]hen [the Emirate] took over and provided for the management of [Union]," *Drexel VII*, 810 F. Supp. at 1387, and "[w]hen the Committee marshalled, managed, and liquidated Galadari's assets," *id.*, they engaged in commercial activities outside the United States that could be conducted by a private party, and in fact had been performed by Galadari. *See id.*

> We agree that these *activities* might be regarded as *commercial, but they are not activities that "cause[d] a direct effect in the United States,"* § 1605(a)(2), upon which the claims of Drexel and Refco are based. Drexel and Refco do not claim that Union was mismanaged and that this had some detrimental "effect" upon them in the United States. Nor do they contend that the management of Galadari's assets by the Committee generated such an effect.

App. 23-24a (footnote omitted; emphasis added). The Second Circuit thus concluded that the third clause of § 1605(a)(2) requires that the act which must have a "direct effect" in the United States is the commercial activity of the Emirate and the Committee elsewhere. Again, the Second Circuit is in error.

The statute is clear: "a foreign state shall not be immune ... in any case ... in which *the action is based ... upon an act outside the territory of the United States* in connection with a commercial activity of the foreign state elsewhere *and that act causes a direct effect in the United States.*" § 1605(a)(2). The act which must cause a "direct effect in the United States" is the act outside the territory of the United States taken in connection with a commercial activity of the foreign state elsewhere. The Second Circuit was wrong to require that the wrongful acts themselves be commercial activity. It is inescapable that the phrase "and that act causes a direct effect in the United States" can refer only to the prior use of the term "act in the statute" which is the "act outside the United States."

The Second Circuit's ruling also has the effect of collapsing into a single requirement the two separate statutory requirements that a plaintiff plead that defendant engaged in (a) an act outside of the U.S., (b) which act was performed in connection with a commercial activity. Thus, in the instant case, the Second Circuit assumed that the Committee was engaged in commercial activity in winding up Galadari's affairs, but concluded that, because it deemed the acts performed by the Committee outside of the United States, *to wit*, the Committee's refusal to pay Refco's and Drexel's claims to be "adjudicative" and concerned with the Committee's "judicial" role, the

commercial acts of the Committee were subsumed within its sovereign activity and, therefore, not entitled to immunity. Again, such an interpretation runs counter to the plain statutory language and impermissibly alters terms that Congress saw fit to include in the statute. *Freytag*, 111 S. Ct. at 2638; *Menasche*, 348 U.S. at 538-39.

In addition, this Court should grant certiorari to resolve a difference among circuit courts regarding the proper interpretation to be given to the third clause. For example, the Third Circuit in *Federal Ins. Co. v. Richard I. Rubin & Co., Inc.*, Nos. 93-1157, 93-1590, 1993 U.S. App. LEXIS 33704, *58 (3d Cir. Dec. 28, 1993) based upon its reading of *Nelson*, held that the "third clause[] of the FSIA commercial activity section use[s] the 'in connection with' language, which arguably might allow for a more tenuous causal link between the claims alleged and the commercial activities [of the foreign sovereign]"); *see Vermeulen v. Renault, U.S.A., Inc.*, 985 F.2d 1534, 1544-45 (11th Cir. 1993) (holding that an owner of an Renault automobile involved in an accident may sue the French manufacturer of the car ["RNUR"], which was a corporation wholly owned by the French government, for personal injuries suffered on the ground that RNUR's alleged negligent design and manufacture of the car in France were acts connected to a commercial activity of RNUR outside the U.S.); *Siderman de Blake v. Republic of Argentina*, 965 F.2d at 710 (holding that plaintiffs' expropriation claims may satisfy the third clause of § 1605(a)(2) where the seizure and operation of a business in Argentina were performed "in connection with" the commercial activities of operating a hotel and managing real estate investments); *see also Stena Rederi AB v. Comision de Contratos Del Comite*, 923 F.2d 380, 386 (5th Cir. 1991) (describing the third clause of § 1605(a)(2) as requiring that "a commercial activity carried on outside the United States [have] a direct effect in the United States"). By contrast, as discussed herein, the Second Circuit has determined to apply a more restrictive interpretation to the third clause, in effect requiring that the claim be based, not upon an act "in connection with" commercial activity, but upon a commercial activity itself. This split of authority with

respect to the proper interpretation to be given to a crucial portion of the FSIA warrants resolution by this Court.

2. The Decision Below Also is Contrary to the Plain Language of § 1605(a)(1) -- the Waiver Exception to Foreign Sovereign Immunity.

The Second Circuit's decision purports to apply the rule that an implicit waiver under § 1605(a)(1) should be "unambiguous." However, the Second Circuit effectively has transformed this rule so that an implicit waiver may be found only where the foreign state does not later attempt to withdraw such waiver. The Second Circuit impermissibly inserts a subjective intent test into the rule and thereby contravenes the plain language of the statute, which explicitly states that a foreign state may waive its immunity "explicitly or by implication" and that such a waiver is effective "notwithstanding any withdrawal of the waiver the foreign state may purport to effect." *See Connecticut Nat'l Bank v. Germain*, 112 S. Ct. at 1149.

The Second Circuit did not contest the district court's findings of fact on the waiver issue. Thus, the court acknowledged that, in the Drexel case, the Committee participated extensively in that action over a period of many years without asserting immunity. Similarly, the Second Circuit did not take issue with the fact that the Committee voluntarily elected to appear in the Refco action, opposed Refco's motion for an order of attachment, argued the merits of Refco's claims and sought affirmative relief from the court also without asserting immunity. Nevertheless, the court ignored the evidence regarding the Committee's full and unequivocal participation in the Drexel and Refco actions, holding instead that the Committee's subsequent "invocations of immunity" sufficiently demonstrated its intent not to waive sovereign immunity. However, invocations of immunity occurring after the foreign state has participated and sought affirmative relief in an action constitute, at best, an impermissible attempt to withdraw a prior waiver. The clear language of § 1605(a)(1) renders the Committee's belated efforts to assert immunity a nullity.

The statute expressly gives a foreign state a choice of asserting a foreign sovereign immunity defense or participating

in litigation and thereby waiving an immunity defense. The clear effect of the waiver provision is to mandate that the foreign state abide by its choice. If the foreign state elects to litigate in a U.S. court, it is barred from later attempting to withdraw its waiver.

Section 1605(a)(1), if interpreted in accordance with its plain language, positively impacts upon litigation involving foreign states by insuring the same degree of predictability sought in all litigation. By permitting foreign states to elect to submit to litigate in U.S. courts, while maintaining the ability to assert an immunity defense at some later date, the Second Circuit has materially prejudiced U.S. litigants. It would be unfair to litigants to permit a foreign state to elect fully to participate in litigation in order to, *inter alia*, pursue comity deference based on sovereignty, lose and then get a "second bite at the apple" by belatedly claiming sovereign immunity. Predictability will best be served by requiring foreign states to assert immunity at the very outset of the litigation, and not at some later point in the litigation, after litigants have incurred significant litigation costs and the courts have expended judicial resources.

The inequity caused by the Second Circuit's misreading of § 1605(a)(1) aptly is illustrated by the facts here. Respondents elected to appear in the Refco and Drexel actions in the U.S. courts in furtherance of their effort to prevent Refco and Drexel from recovering on their claims, rather than to assert sovereign immunity from the outset. This litigation, in addition to the enormous costs incurred by petitioners, had involved the active participation of the courts, including numerous hearings, motion practice, seven opinions by the district court, and an appeal to the Second Circuit. Respondents were content to avail themselves of the U.S courts when it appeared they were going to be successful in having the U.S. actions stayed in favor of the proceedings in Dubai. It is only after certain 1991 decisions of the district court made clear that respondents might be held to be liable to Refco and Drexel and the stays were lifted did respondents determine that an assertion of sovereign immunity suited their new litigation strategy. The Second Circuit's

decision sanctions respondents' cynical and statutorily impermissible ploy.

The Second Circuit's decision also is at variance with a recent Ninth Circuit decision on the waiver exception under the FSIA. Thus, in *Siderman de Blake*, the Ninth Circuit ruled that Argentina implicitly waived its immunity in a civil action by deliberately participating in litigation in a California state court in connection with a separate Argentine proceeding, despite the invocation of an immunity defense in its first responsive pleading. 965 F.2d at 722. The Ninth Circuit held that Argentina's use of the U.S. courts in an effort to obtain jurisdiction over Siderman, prior to the institution of Siderman's lawsuit, waived any sovereign immunity Argentina may have had with respect to claims relating out of Argentina's acts. *Id.* Thus, in determining whether there has been an implied waiver, the Ninth Circuit focused solely on the objective conduct of the foreign state, rather than its subjective intent. *See Aboujdid v. Singapore Airlines, Ltd.*, 67 N.Y.2d 450, 459, 503 N.Y.S.2d 555, 559 (1986) (waiver of immunity results from "participation in and seeking affirmative benefit from the litigation, without reservation"); *see also Sea Lift, Inc. v. Refinadora Costarricense de Petroleo, S.A.*, 601 F. Supp. 457, 466 (S.D. Fla. 1984); *Corporacion Venezolana de Fomento v. Vintero Sales Corp.*, 477 F. Supp. 615, 619 n.9 (S.D.N.Y. 1979), *rev'd on other grounds*, 629 F.2d 786 (2d Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981).

The decisions cited by the Second Circuit in support of its refusal to imply a waiver are inapposite. In each, the foreign state clearly had expressed at the *outset* of the litigation its intention to assert immunity. *See, e.g., Canadian Overseas Ores, Ltd. v. Compania de Acero del Pacifico S.A.*, 727 F.2d 274, 276 (2d Cir. 1984) (the foreign state "had previously implicitly or explicitly reserved its right to assert [FSIA] immunity in three separate documents [served in the first four months of the litigation]"); *Foremost-McKesson, Inc. v. The Islamic Republic of Iran*, 905 F.2d 438, 444 (D.C. Cir. 1980) (rejecting a waiver claim on the grounds that the defendant was not required to assert its immunity defense in its first answer to the complaint because of the the limited nature of the initial

pleading and the fact that the answer neither denied the allegations of the complaint nor asserted FSIA immunity but was limited to a request that the court defer to the jurisdiction of another forum); *see also Frovola v. U.S.S.R.*, 761 F.2d 370, 378 (7th Cir. 1985) (holding only that a failure to appear does not represent a "conscious decision to take part in the litigation and a failure to raise sovereign immunity despite an opportunity to do so"). None of these cases suggests that where, as here, the foreign state has appeared generally, argued the merits of plaintiff's case, opposed an injunction motion and sought affirmative relief from the court, and in a related case answered, denied the allegations of the complaint and asserted 25 affirmative defenses without asserting sovereign immunity, the sovereign may, at a later date when it suits its litigation strategy, assert immunity.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 28, 1994

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1545, 1546-August Term, 1992

(Argued: April 29, 1993 Decided: November 29, 1993)

Docket Nos. 93-7078, 93-7086

THE DREXEL BURNHAM LAMBERT GROUP INC., and REFCO, INC.,

Plaintiffs-Appellees,

- against -

THE COMMITTEE OF RECEIVERS FOR A.W. GALADARI, and THE EMIRATE OF DUBAI, UNITED ARAB EMIRATES,

Defendants-Appellants,

- and -

A.W. GALADARI, AND A.W. GALADARI COMMODITIES, a division of A.W. Galadari Holdings (Private) Limited,

Defendants.

Before:

LUMBARD, NEWMAN,** AND MAHONEY,
Circuit Judges.

** Judge Newman became Chief Judge of the Second Circuit Court of Appeals on July 1, 1993.

Defendant-appellants in this consolidated action appeal from an order entered January 19, 1993 in the United States District Court for the Southern District of New York, Constance Baker Motley, *Judge*, that denied their motion to dismiss plaintiffs-appellees' amended and supplemental complaints on the basis of foreign sovereign immunity. Defendant-appellant the Emirate of Dubai, United Arab Emirates appeals from an order of the district court dated January 22, 1993 that denied the Emirate's motion to quash discovery.

The order denying the motion to dismiss the amended and supplemental complaints is reversed. The appeal from the order denying the Emirate's motion to quash discovery is dismissed as moot. Chief Judge Newman dissents in a separate opinion.

H. BARRY VASIOS, New York, New York (Anjali G. Asnanee, Elizabeth A. Berney, Gilbert, Segall and Young, New York, New York, of counsel), *for Defendant-Appellant The Emirate of Dubai, United Arab Emirates.*

RICHARD W. REINTHALER, New York, New York (Paul L. Friedman, Dwight A. Healy, White & Case, New York, New York, of counsel), *for Defendant-Appellant The Committee of Receivers for A.W. Galadari.*

EDWARD L. POWERS, New York, New York (Joel L. Dempsey, Richards & O'Neil, New York, New York, Thomas W. Hill, Jr. West Palm Beach, Florida, of counsel), *for Plaintiff-Appellee The Drexel Burnham Lambert Group, Inc.*

MARIANNE BRETTON-GRANATOOR, New York, New York (Jack Weinberg, Therese M. Doherty, Graubard Mollen Horowitz Pomeranz & Shapiro, New York, New York, of counsel), *for Plaintiff-Appellee Refco, Inc.*

MAHONEY, *Circuit Judge:*

Defendant-appellants The Committee of Receivers for A.W. Galadari (the "Committee") and The Emirate of Dubai, United Arab Emirates (the "Emirate") appeal form an order entered January 19, 1993 in the United States District court for the Southern District of New York, Constance Baker Motley, *Judge*, that denied their motions to dismiss the amended and supplemental complaints of plaintiffs-appellees The Drexel Burnham Lambert Group Inc. ("Drexel") and Refco, Inc. ("Refco") in this consolidated action, and directed that the Committee and the Emirate provide Drexel and Refco with security covering costs and, in the case of Refco, attorney fees. The Committee and the Emirate sought to dismiss the amended and supplemental complaints on the basis, *inter alia*, that they were entitled to sovereign immunity pursuant to Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-1611 (the "FSIA"), and the court accordingly lacked subject matter jurisdiction. The Emirate also appeals from a January 22, 1993 order of the district court that denied the Emirate's motion to quash discovery against the Emirate.

We reverse the order denying the motion to dismiss the complaint on the basis that the Committee and the Emirate are entitled to foreign sovereign immunity. We also dismiss as moot the appeal from the order denying the Emirate's motion to quash discovery.

Background

In this appeal, we revisit a litigation commenced more than nine years ago that has occasioned one prior opinion of this court, as well as a number of opinions by the district court. *See Drexel Burnham Lambert Group, Inc. v. Galadari*, 777 F.2d 877 (2d Cir. 1985) ("*Drexel II*"), *aff'g in part and vacating in part* 610 F. Supp. 114 (S.D.N.Y. 1985) ("*Drexel I*"); *Drexel Burnham Lambert Group, Inc. v. Galadari*, No. 84 Civ. 2602 (CBM), 1986 WL 4692 (S.D.N.Y. Apr. 17, 1986) ("*Drexel III*"); *Drexel Burnham Lambert Group Inc. v. Galadari*, No. 84 Civ. 2602, 1987 U.S. Dist. LEXIS 5030 (S.D.N.Y. Jan. 29, 1987) ("*Drexel*

IV"); *Refco, Inc. v. Galadari*, 755 F. Supp. 79 (S.D.N.Y. 1991); *Drexel Burnham Lambert Group, Inc. v. Galadari*, 134 B.R. 719 (S.D.N.Y. 1991) ("*Drexel V*"); *Drexel Burnham Lambert Group, Inc. v. Galadari*, 127 B.R. 87 (S.D.N.Y. 1991) ("*Drexel VI*"). Familiarity with these decisions, and with the decision of the district court from which the instant appeal is taken, *Drexel Burnham Lambert Group Inc. v. Committee of Receivers for A.W. Galadari*, 810 F. Supp. 1375 (S.D.N.Y. 1993 ("*Drexel VII*"), is assumed.

In April 1984, the Emirate established the Committee to wind up the business affairs and liquidate all nonbanking assets of Abdul Wahab Bin Ebrahim Galadari ("Galadari"), a citizen of Dubai, following a financial crisis in Dubai precipitated by the threatened collapse of the Union Bank of the Middle East, Ltd. ("Union"). Galadari controlled Union, one of the largest banks in the United Arab Emirates. The Committee is the successor to a provisional board of directors (the "Provisional Board") established by the government of Dubai in November 1983 to manage both Union and (until the formation of the Committee) Galadari's nonbanking assets. The Committee is comprised of four prominent citizens of Dubai, and is vested with the authority to liquidate Galadari's assets, pay Galadari's creditors, and bring and defend actions on behalf of the Galadari "estate." Decisions of the Committee may be appealed to a three-member judicial committee established for this purpose. We have noted that the decree which established the Committee "appears to be Dubai's first attempt to frame an insolvency law." *Drexel II*, 777 F.2d at 881.

Galadari had served as chairman of Union's board of directors, and had also controlled A.W. Galadari Holdings (Private) Ltd. ("Holdings"), a Dubai corporation that owned forty-six percent of Union's stock. Galadari's business ventures also included A.W. Galadari Commodities ("Commodities"), a partnership managed by Galadari that engaged in commodities trading on United States exchanges. Commodities conducted trading through, *inter alia*, accounts maintained with Drexel and Refco.

A. *The Drexel Action.*

The Drexel action stems from certain trading losses incurred by Galadari in 1982 and covered by a Drexel affiliate, Drexel Burnham Lambert International, N.V. ("Drexel International"). In satisfaction of the resulting debt, Galadari and Commodities provided a promissory note (the "Note") in the amount of $19,465,000 to Drexel International, secured by a pledge of 6,068,640 shares of Union stock. Drexel International assigned the Note to Drexel in October 1982.

Galadari and Commodities made some payments of principal on the Note that reduced the principal outstanding by $7,000,000, as well as some payments of interest, but defaulted and ceased payments in February 1984. Drexel made an initial demand for payment of the balance due on the Note to the Provisional Board, which the Board rejected. On April 12, 1984 Drexel instituted the present action against Galadari and Commodities seeking recovery on the Note. On April 17, 1984, the Committee was established by royal decree to wind up Galadari's affairs.

On May 17, 1984, the Committee filed an answer to Drexel's complaint "on behalf of Galadari and Commodities" that set forth numerous affirmative defenses, including (1) lack of subject matter jurisdiction, and (2) deference in favor of proceedings conducted by the Committee on the basis of (a) international comity, and (b) the act of state doctrine. The Committee did not then assert the defense of foreign sovereign immunity.

On May 24, 1984, Drexel moved for summary judgment. The Committee cross-moved to stay or dismiss the action on the grounds of (1) lack of subject matter jurisdiction, (2) international comity, and (3) the act of state doctrine. The district court denied Drexel's motion and the Committee's cross-motion insofar as it rested upon lack of subject matter jurisdiction and the act of state doctrine, but dismissed the complaint on the basis of international comity. *See Drexel I*, 610 F. Supp. at 117-19.

Drexel appealed from the dismissal on the basis of comity, and the Committee cross-appealed from the refusal to dismiss on grounds of subject matter jurisdiction and the act of state doctrine. We affirmed on the cross-appeal, but vacated the dismissal of the action and remanded for an evidentiary hearing on the question whether comity called for deference to the Committee's proceedings in Dubai. *See Drexel II*, 777 F.2d at 881-82. We noted that "our courts have had not experience with Dubai bankruptcy practices and procedures," *id.* at 881, and that Drexel had not had an opportunity to conduct discovery regarding these procedures. *See id.*

Drexel then moved in the district court to enjoin the Committee from proceeding with the adjudication of Drexel's claim in Dubai. In a memorandum of law filed in response to Drexel's motion, the Committee noted that "Drexel's application for injunctive relief represents the first time in the is action that any claim for relief has been asserted against the Committee itself, as distinguished form the two named defendants," and added that "[i]f Drexel believes it has a basis for a claim against the Committee, it should be required to move for leave to amend its complaint or bring a new action, naming the Committee as a defendant ... and providing the Committee with a proper opportunity to ... assert its immunity from suit under the [FSIA]."

The district court denied Drexel's application for a preliminary injunction. *See Drexel III*, 1986 WL 4692 at *1-2. In a subsequent opinion, the district court found that "[t]he Dubai bankruptcy decree and proceedings at issue here have been shown by [the Committee] to be consistent with our basic notions of fairness and due process" and to be "fundamentally fair to all creditors." *Drexel IV*, 1987 U.S. Dist. LEXIS 5030 at *49. The district court accordingly stayed this action pending resolution of Drexel's claims in Dubai. *Id.* at *71.

B. *The Refco Action*

As in the case of Drexel, the dispute concerning Refco originated in trading losses incurred by Galadari and

commodities and covered by Refco. It is undisputed that Galadari and Commodities owed Refco $6,109,664.20 pursuant to (1) a customer agreement between Refco and Galadari dated March 24, 1983, and (2) a letter agreement dated July 6, 1983 that was executed by Galadari on his and Commodities' behalf. The letter agreement acknowledged the $6,109,664.20 debt and specified terms of repayment. Refco received $1.5 million in payments on this debt, leaving an outstanding balance of $4,609,664.20.

In August 1984, Refco brought suit against Galadari and Commodities in the Supreme Court of the State of New York, County of New York, to collect this debt. In that action, Refco obtained a temporary restraining order to bar the sale or encumbrance of any and all assets held by Galadari and Commodities or by others for their account, and also sought to attach and levy upon such property. The Committee appeared in the New York court to oppose this application on the grounds of (1) fairness to other creditors in the Dubai liquidation proceedings, and (2) international comity. In an order dated March 27, 1985, the New York court (Kenneth Shorter, *Justice*) declined to continue the restraining order except as it related to a condominium apartment in New York City maintained by Galadari's family and owned by a Bermuda corporation, all of whose outstanding shares were owned by Galadari and/or his wife, and denied the application for an attachment. The New York court also ruled *sua sponte* that "[t]he [Committee] shall be added as an additional party." *Refco, Inc. v. Galadari*, No. 18541/84, slip op. at 4 (N.Y. Sup Ct., N.Y. County Mar. 27, 1985).

Subsequently, in a September 1985 memorandum of law "submitted by additional defendant, the Committee of Receivers" in support of a motion to dismiss or stay the state court action, the Committee asserted that under the FSIA, the state court did not have personal or subject matter jurisdiction over the Committee. By stipulation of the parties, the motion was thereafter withdrawn, and the action was stayed in the New York court upon representations by the Committee that it was actively engaged in reviewing

Refco's claims in proceedings in Dubai. In January 1990, Refco refused to consent to further adjournments in favor of proceedings in Dubai, and the Committee removed the action to the United States District Court for the Southern District of New York pursuant to 28 U.S.C. § 1441(d) (1988). The case was assigned to Judge Motley, who in January 1991 (1) denied Refco's motion to remand the case to state court, (2) consolidated the removed action with the Drexel action, and (3) stayed the consolidated action pending the outcome of the proceedings in Dubai. *See Refco*, 755 F. Supp. at 84.

Finally, when the Committee ultimately served an answer to Refco's initial complaint in July 1991, it asserted foreign sovereign immunity among its affirmative defenses.

C. *The Consolidated Action*

The key issue in the Dubai proceedings was whether, as Drexel and Refco contended, Commodities was a division of Holdings, with the result that the claims of Drexel and Refco against Commodities could be satisfied from the assets of Holdings. Holdings had significant liquid assets, but Commodities did not. In attempting to resolve this issue, the Committee held a series of hearings reviewed documents and expert opinions submitted by the parties, and commissioned an independent review of the books and records of both Commodities and Holdings. With no decision forthcoming by early 1991, however, Drexel and Refco moved in the district court to vacate the stay, claiming that the Dubai proceedings should not longer be accorded comity because they had been conducted in an unfair manner and inordinately delayed in an attempt to deny their legitimate claims.

The district court rendered opinions dated March 19, 1991 (*Drexel V*) and April 8, 1991 (*Drexel VI*) in response to the applications by Drexel and Refco, respectively, to vacate the stay. The court agreed with the contentions of Drexel and Refco that the Committee had unfairly considered and unjustifiably delayed resolution of the "relatively simple" Holdings/Commodities question citing, *inter alia*, (1) numerous expert opinions regarding the issue to which the Committee had access but which had apparently failed

to resolve the matter, (2) continued representations of the Committee to the district court that a decision on this question was imminent, and (3) a conflict of interest on the part of a counsel who both represented the Committee in the district court action in contesting the claims of Drexel and Refco and served as a legal advisor to the Committee in Dubai. *See Drexel V*, 134 B.R. at 722-28; *Drexel VI*, 127 B.R. at 93-100. The court also expressed the view that the Committee was orchestrating a determination adverse to Drexel and Refco in contravention of the evidence presented to it. *See Drexel VI*, 127 B.R. 98-99. Accordingly, the district court ruled that unless the Committee rendered a decision on the outstanding claims by April 16, 1991, the stay would be vacated.

On April 14, 1991 the Committee rendered its decision (1) conceding the indebtedness of Galadari and Commodities to Drexel and Refco, but (2) rejecting the contention of Drexel and Refco that Commodities was a division of Holdings and that Holdings was accordingly liable for the debts of Commodities, and (3) ruling that Drexel's Note was not properly secured by Galadari's pledge of Union shares. Drexel and Refco appealed the Committee's decision in Dubai,[1] and also moved in district court to vacate the outstanding stay. In a order entered July 1, 1991, the district court granted the motion to vacate the stay, noting as "another example of fundamental unfairness and a denial of due process" the fact that the appeal of the Committee's decision would be heard in arabic rather than English, although the proceedings before the Committee had been conducted in English.

The Committee then filed an amended and supplemental answer to Drexel's complaint, as before "in its representative capacity on behalf of defendants Galadari and Commodities." The Committee did not plead the defense of foreign sovereign immunity, but asserted affirmative defenses calling for deference to the Committee's prior determination on the

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[1] The parties have not indicated the disposition of this appeal.

basis of comity, New York law regarding the recognition of foreign judgments, and res judicata.

Thereafter, with leave of the district court and over the Committee's objections citing, *inter alia*, the FSIA, Drexel and Refco filed amended and supplemental complaints that asserted new claims for relief directly against the Committee and the Emirate. These new claims alleged that: (1) the Committee and the Emirate were responsible as successors-in-interest for the liabilities of Galadari, Commodities, and Holdings; (2) the Committee and the Emirate had breached promises and representations to Drexel and Refco that their claims would be fairly adjudicated in the Dubai proceedings; and (3) the committee's wrongful refusal to pay these claims constituted and unlawful taking of property without just compensation in violation of international law.

The parties then entered into a stipulation dated March 18, 1992 by which the Committee's counsel agreed to accept service of the amended and supplemental complaints and related documents "on behalf of defendant The Committee of Receivers, *qua* Committee and as representative of [Galadari, Commodities and Holdings." The stipulation, however, was

> without prejudice to and [did] not constitute a waiver of:
>
> (a) the merits of any jurisdictional or other defenses the Committee may have with respect to the claims set forth in the Amended and Supplemental complaints ...;
>
> (b) any arguments or claims that Refco and/or Drexel may have that the Committee, through its prior participation in the proceedings in this court and in the New York state court prior to removal of the Refco action, assumed the status of a "party" and/or waived the defense, if any, of sovereign immunity;

(c) the Committee's contrary position with respect to paragraph [b] hereof; and

(d) any argument or claims that any party may have with respect to whether the Committee is a political subdivision, agency or instrumentality, and/or alter ego of the [Emirate].

On June 8, 1992, the Committee answered Drexel's amended and supplemental complaint "in its representative capacity on behalf of defendants Galadari and Commodities only" without asserting the defense of foreign sovereign immunity, while again asserting affirmative defenses calling for deference to the Dubai proceedings. The Committee answered the Refco amended and supplemental complaint similarly, but added the affirmative defenses of *forum non conveniens* and absence of personal jurisdiction over the defendants.

On August 24, 1992, the Emirate moved to dismiss the amended and supplemental complaints on the basis of foreign sovereign immunity pursuant to the FSIA, lack of personal jurisdiction over the Emirate, the act of state doctrine, judicial immunity, and "the applicable statutes of limitation."[2] The Emirate also moved to quash discovery against the Emirate. The district court denied these motions, concluding that the Committee and the Emirate had implicitly waived foreign sovereign immunity "[b]ecause the Committee voluntarily intervened as the real party in interest

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[2] As nearly as we can ascertain, the notice of motion and supporting papers were filed only on behalf of the Emirate, but the Committee subsequently filed a reply affidavit and reply declaration in support of the motion to dismiss. The district court stated that the Emirate and the Committee "separately move[d] to dismiss the amended and supplemental complaints. *Drexel VII*, 810 F. Supp. at 1377. We proceed on the basis that both the Emirate and the Committee moved to dismiss on the indicated grounds.

in both federal and state proceedings and filed responsive pleading[s] without preserving its right to sovereign immunity," and because the Emirate "appeared through its agent the Committee without preserving immunity." *Drexel VII*, 810 F. Supp. at 1384-85; *see* 28 U.S.C. § 1605(a)(1)(1988). The court ruled alternatively that the Committee and the Emirate were not entitled to FSIA immunity because the Committee and the Emirate had engaged in commercial activity in Dubai that directly affected Drexel and Refco in the United States. *See Drexel VII*, 810 F. Supp. at 1385-88; 28 U.S.C. § 1605(a)(2)(1988).

The court also rejected proffered defenses of absence of personal jurisdiction, *id.* at 1388-90, the act of state doctrine, *id.* at 1390-91, judicial immunity, *id.* at 1391-92, and the statute of limitations. *Id.* at 1392. The district court granted a motion by Drexel and Refco that the Committee and the Emirate be required to provide Drexel and Refco with security covering costs and, in the case of Refco, attorney fees. *Id.* at 1392-93. Finally, in a January 22, 1993 bench ruling, the district court denied the Emirate's motion to quash discovery.

These appeals followed. In response to motions by the Committee and the Emirate, this court stayed all proceedings in the district court pending the determination of this appeal and expedited the appeal. In addition, we dismissed on jurisdictional grounds the Committee's appeal from the district court's decision to grant security for costs to Drexel and Refco.

Discussion

The district court correctly concluded that insofar as the amended and supplemental complaints assert claims directly against the Emirate and the Committee as an instrumentality of the Emirate, the FSIA provides the sole basis for subject matter jurisdiction in United States Courts. *See Drexel VII*, 810 F. Supp. at 1379-80 (*citing Republic of Argentina v. Weltover, Inc.*, 112 S. Ct. 2160, 2164 (1993); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989)); *see also Saudi Arabia v. Nelson*, 113 S. Ct.

1471, 1476 (1993); *NYSA-ILA Pension Trust Fund v. Garadua Indonesia*, No. 93-7230, slip op. 6411, 6415-16 (2d Cir. Oct. 6, 1993) (citing *Amarada Hess*, 488 U.S. at 434). When review of a denial of a motion to dismiss for lack of subject matter jurisdiction under the FSIA is sought, "[w]e have appellate jurisdiction pursuant to the 'collateral order doctrine' of *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545-47 (1949)." *Weltover, Inc. v. Republic of Argentina*, 941 F.2d 145, 147 (2d Cir. 1991) (citing *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 443 (D.C. Cir. 1990)), *aff'd*, 112 S. Ct. 2160 (1992).

Because the issues presented for consideration on this appeal involve the application of the FSIA to essentially undisputed facts, we review *de novo*. *See Shapiro v. Republic of Bolivia*, 930 F.2d 1013, 1016-17 (2d Cir. 1991). As to the waiver issue, while we have recognized some discretion on the part of district courts to determine whether a waiver of FSIA immunity has occurred in a particular case, *see Canadian Overseas Ores Ltd. v. Compania de Acero del Pacifico S.A.*, 727 F.2d 274, 278 (2d Cir. 1984), a review for abuse of discretion yields the same outcome in this case, because "[a]buse of discretion can be found if the district court incorrectly applied the law." *Nikon Inc. v. Ikon Corp.*, 987 F.2d 91, 94 (2d Cir. 1993) (citing *Bristol-Myers Squibb Co. v. McNeill-P.P.C., Inc.*, 973 F.2d 1033, 1038 (2d Cir. 1992)). In our view, the district court incorrectly applied the law regarding both the "waiver and "commercial activity" exceptions to the general rule of foreign sovereign immunity provided by the FSIA.

A. *The Applicable Provisions of the FSIA.*

The FSIA provides that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter." 28 U.S.C. § 1604 (1988). The Emirate is a foreign state, and the parties do not dispute that the Committee is an "agency or instrumentality" of the Emirate as defined in 28 U.S.C. § 1603(a) and (b)(1988), and thus

subject to FSIA. The exceptions at issue in this case are provided by § 1605(a)(1) and (2), which provides that:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case --
>
> > (1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver; [or]
> >
> > (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States....

"Under the [FSIA], a foreign state is presumptively immune from the jurisdiction of United States courts; unless a specified exception applies, a federal court lacks subject matter jurisdiction over a claim against a foreign state." *Nelson*, 113 S. Ct. at 1476 (citing *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488-89 (1983)); *see also Weltover*, 112 S. Ct. at 2164; *Amerada Hess*, 488 U.S. at 434-35. Furthermore,

> [o]nce the defendant presents a prima facie case that it is a foreign sovereign, the plaintiff has the burden of going forward with showing that, under exceptions to the FSIA, immunity should not be granted, *Baglab Ltd. v. Johnson Matthey Bankers Ltd.*, 665 F. Supp. 289, 293-94 (S.D.N.Y. 1987), although the ultimate burden or persuasion remains with the alleged foreign

sovereign. *Forsythe v. Saudi Arabian Airlines Corp.*, 885 F.2d 285-289 n. 6 (5th Cir. 1989).

Cargill Int'l S.A. v. M/T Pavel Dybenko, 991 F.2d 1012, 1016 (2d Cir. 1993); *see also Drexel VII*, 810 F. Supp. at 1380-81 (discussing burden shifting in FSIA cases).

We now consider, against this background, the specific exceptions to FSIA immunity at issue in this case.

B. *The Waiver Exception.*

The district court looked to our ruling in Shapiro, and the legislative history cited in that case, to provide the standard by which to determine this issue. We said in Shapiro:

> Federal courts have been virtually unanimous in holding that the implied waiver provision of Section 1605(a)(1) must be construed narrowly. *See, e.g., Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 444 (D.C. Cir. 1990); *Joseph v. Office of the Consulate General*, 830 F.2d 1018, 1022 (9th Cir. 1987), *cert. denied*, 485 U.S. 905, 108 S. Ct.1077, 99 L.Ed.2d 236 (1988); *Frolova v. USSR*, 761 F.2d 370, 377 (7th Cir. 1985); *L'Europeenne de Banque v. La Republica de Venezuela*, 700 F. Supp. 114, 123 (S.D.N.Y. 1988). This approach is derived form the legislative history of the FSIA, in which Congress specified three examples of implied waiver. The House Report thus states:
>
> > With respect to implicit waivers, the courts have found such waivers in cases where a foreign state has agreed to arbitration in another country or where a foreign state has agreed that the law of a particular country should govern a contract. *An implicit waiver would also include a situation where a foreign state has filed a responsive pleading in an action without raising the defense of sovereign immunity.*

> H.R. Rep. No. 1487, 94th Cong., 2d Sess. 18, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6604, 6617. *These examples involve circumstances in which the waiver was unmistakable, and courts have been reluctant to find an implied Waiver where the circumstances were not similarly unambiguous.*

930 F.2d at 1017 (emphasis added).

The district court concluded that the Committee had met the *Shapiro* standard for waiving FSIA immunity by filing responsive pleadings in this litigation without preserving its immunity. *Drexel VII*, 810 F. Supp. at 1383-84. The court quoted, *id.* at 1383, our statement in *Drexel II* that: "In response to Drexel's suit upon the promissory note, the Committee appeared generally and asserted twenty-five affirmative defenses." 777 F.2d at 880. The court stressed that FSIA immunity was not among them. *Drexel VII*, 810 F. Supp. at 1383. Similarly, the court emphasized that "in the Refco action, the Committee appeared in 1984 and opposed Refco's motion for an order of attachment without raising the issue of sovereign immunity." *Id.* Rather, the Committee "argued that Refco's motion should be denied or stayed upon comity principles." *Id.*

The district court rejected the Committee's contention that it appeared only in a representative capacity in behalf of Galadari and Commodities at these early junctures in the Drexel and Refco actions. Rather, the court opined that the Committee and the Emirate were the "real parties in interest" in the litigation as a result of the Emirate's taking control of Union, some of whose shares were used to secure the Note provided by Galadari and Commodities to Drexel, and the Committee's marshalling and liquidation of Galadari's nonbanking assets. *Id.* at 1384. The court concluded:

> Because the Committee voluntarily intervened as the real party in interest in both federal and state proceedings and filed responsive pleading[s] without preserving its right to sovereign immunity, the Committee has failed to meet its burden of proving that it did not implicitly waive its right to immunity. Addi-

> tionally, because [the Emirate] is the real party in interest as to Galadari's banking assets and appeared through its agent the Committee without preserving immunity, [the Emirate] has failed to meet its burden of proving that it did not implicitly waive immunity. This court, therefore, has subject matter jurisdiction under the waiver exception of the FSIA as to both the Committee and [the Emirate].

Id. at 1384-85.

This conclusion is at least implicitly premised upon a passage of legislative history quoted in *Shapiro*: "An implicit waiver would also include a situation where a foreign state has filed a responsive pleading in an action without raising the defense of sovereign immunity." *Shapiro*, 930 F.2d at 1017 (quoting H.R. Rep. No. 1487 at 18). *Shapiro* further counsels that in evaluating this conclusion, we must bear in mind that "the implied waiver provision of Section 1605(a)(1) must be construed narrowly," *id.* (collecting cases), and that any waiver must accordingly be "unmistakable" and "unambiguous." *Id.*

The Committee and the Emirate were first named as parties defendant in the amended and supplemental complaints filed by Drexel and Refco in the consolidated action. The answers to those complaints, made by the Committee "in its representative capacity in behalf of defendants Galadari and Commodities only," did not assert the defense of FSIA immunity. They were followed almost immediately, however, by a motion to dismiss that did assert the defense. In addition, the Committee had previously: (1) responded to a motion by Drexel to enjoin the Committee's Dubai proceedings by soliciting the district court to require Drexel to amend its complaint to name the Committee as a party as a condition of seeking relief directly against the Committee, pointing out that the Committee would thus be provided the opportunity to assert FSIA immunity; (2) moved to dismiss the Refco action in New York Supreme Court on the basis of FSIA immunity promptly after that court added the Committee as party to that action *sua*

sponte; (3) asserted FSIA immunity as a defense in the initial answer that the Committee filed in the Refco action after it was removed to federal court; (4) cited the FSIA in its opposition to the motions of Drexel and Refco for leave to file amended and supplemental complaints in the consolidated action naming the Committee and the Emirate as defendants; and (5) preserved the defense of FSIA immunity in the stipulation by which the Committee agreed to accept service of the amended and supplemental complaints.

We cannot read such a record as providing the "unmistakable" and "unambiguous" waiver of FSIA immunity that is required by *Shapiro*. The common sense interpretation of the legislative history cited by *Shapiro* is that the filing of a responsive pleading is the *last chance* to assert FSIA immunity if the defense has not been previously asserted. When, as in this case, the filing of answers to the amended and supplemental complaints in the consolidated action was preceded by five invocations of FSIA immunity, including the Committee's initial answer to a Refco complaint, and almost immediately followed by a motion to dismiss on the ground, *inter alia*, of FSIA immunity, we perceive no basis to find that a § 1605(a)(1) waiver has occurred.

This analysis is also supported by our ruling in *Canadian Overseas*. In that case, no responsive pleading was ever filed, but the defendant claiming FSIA immunity ultimately moved to dismiss on that basis, after moving to dismiss or stay on other grounds more than two years earlier without asserting FSIA immunity. However, the defendant had previously "implicitly or explicitly reserved its right to assert [FSIA] immunity in three separate documents - its petition for removal, its memorandum in opposition to remand and [a] stipulation concerning the amended complaint." 727 F.2d at 276. We affirmed the dismissal that was granted in response to the second motion to dismiss, while noting "the discretionary authority of district courts to effect an earlier resolution of the [FSIA immunity] issue by requiring, on the motion of a party or *sua sponte*, assertion or abandonment of the defense prior to the submission of a responsive pleading." *Id.* at 278. We also concluded that although

"district courts have discretion to determine that the conduct of a party in litigation does constitute a waiver of [FSIA] immunity in light of the circumstances of a particular case" regarding the party's conduct in the litigation, *id.*, the district court had not exceeded its discretion by refusing to find a waiver in view of (1) the defendant's assertion on three occasion of an intention to asset the defense, and (2) the fact that the litigation had been dormant for a considerable period of time.

The Committee's essential effort in this litigation has been to persuade the district court to defer to the proceedings before the Committee in Dubai. In *Foremost-McKesson*, a similar case, the Court of Appeals for the District of Columbia determined that the Republic of Iran should be allowed to assert the defense of FSIA immunity in an amended answer, even though its initial answer did not do so, because of the limited nature of the initial pleading. In that case, the plaintiffs sued the Republic of Iran, contending that Iran had illegally divested the plaintiffs of their ownership rights in a dairy. *See* 905 F.2d at 440-41. Iran filed an "Answer to Complaint" in response to plaintiffs' complaint that neither denied the allegations of the complaint nor asserted FSIA immunity. *See id.* at 441, 444. Instead, Iran maintained that any claims that the plaintiffs had were required to be brought before a claims tribunal established for that purpose. *See id.* Following the decision of that body, plaintiffs sought to renew their lawsuit, and the district court granted Iran's resulting motion to amend its answer to assert the defense of FSIA immunity despite Iran's previous silence on this issue. *Id.* at 442.

On appeal, the court rejected the plaintiffs' claim that Iran had impliedly waived FSIA immunity and should not have been allowed to amend its answer to assert that defense. The court stated:

> Foremost is correct in asserting that, *in most instances*, a state's failure to assert sovereign immunity in a responsive pleading will constitute a waiver of the defense. But the situation here is different because, in

1982, Iran did not respond substantively to any of the averments in the complaint or pose any defenses to the claims; instead, Iran merely argued that the action should proceed in another forum, which it then did. Iran's actions in these circumstances did not constitute an implied waiver.

It is true that the House Report accompanying FSIA provides that "[a]n implicit waiver would ... include a situation where a foreign state has filed a responsive pleading in an action without raising the defense of sovereign immunity." H. Rep. No. 1487, 94th Cong., 2d Sess. 18 (1976), U.S. Code Cong. & Admin. News 1976, pp. 6604, 661[7]. We agree with the Seventh Circuit, however, that the example of an implied waiver

> given the legislative history - filing a responsive complaint without raising an immunity defense - demonstrates that Congress anticipated, at a minimum, that waiver would not be found absent a *conscious decision* to take part in the litigation *and* a *failure to raise sovereign immunity* despite the opportunity to do so.

Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 378 (7th Cir. 1985) (citation omitted). Iran's 1982 Answer does not exhibit such a conscious decision or opportunity.

Id. at 443-44 (emphasis added). Although the analogy to *Foremost-McKesson* is not perfect, that case affords strong support to our conclusion that on the overall record in this case, no implicit waiver of FSIA immunity may properly be attributed to the Committee and the Emirate.

We also conclude that the district court's ruling that the Committee was the "real party in interest" with respect to the nonbanking assets of Galadari and Commodities, and that the Emirate should be so regarded with respect to the Union shares that Galadari pledged ot Drexel, *see Drexel VII*, 810

F. Supp. at 1384, cannot form an alternate basis for a finding of implied waiver of FSIA immunity. The thrust of this ruling is to deprecate the Committee's claims that it appeared in a representative capacity in behalf of Galadari and Commodities until the committee and the Emirate were explicitly named as defendants in the amended and supplemental complaints in the consolidated action. The view taken regarding the "real party in interest" question, however, does not materially affect the nature of the Committee's involvement in the earlier stages of the litigation. Assuming *arguendo* that the Committee, despite its intention to appear in a representative capacity, should be deemed to have appeared generally because it was the "real party in interest," the question remains whether, given its understanding of its position, the Committee adequately signalled the present or future invocation of FSIA immunity. However its participation is regarded, the Committee consistently invoked FSIA immunity, or reserved the right to do so in the future, to an extent that precludes a determination that FSIA immunity was unambiguously and unmistakably waived.

C. *The Commercial Activity Exception.*

The district court determined that the Committee and the Emirate were not entitled to FSIA immunity not only because they had implicitly waived that immunity within the meaning of § 1605(a)(1), but also because they had engaged in activity that feel within the "commercial activity" exception contained in the third clause of § 1605(a)(2). This exception provides for subject matter jurisdiction in cases "in which the action is based upon ... an act outside the territory of the United States in connection with a commercial activity in the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1603(d) defines "commercial activity" to mean

> either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or

particular transaction or act, rather than by reference to its purpose.

The Supreme Court has specified that "a state engages in commercial activity [within the meaning of § 1605(a)(2)] where it exercises '"only those powers that can also be exercised by private citizens,"' as distinct from those '"powers peculiar to sovereigns."'" *Nelson*, 113 S. Ct. at 1479 (quoting *Weltover*, 112 S. Ct. at 2166 (quoting *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 704 (1976) (plurality opinion))). In *Nelson*, the Court addressed the claim of a United States citizen who alleged that he had been recruited in the United States by an agency of Saudi Arabia for employment in that nation, and was subsequently imprisoned and tortured there for complaining about workplace safety hazards. 113 S. Ct. at 1474-75. The Court held that the victim's intentional tort claims, *see id.* 1475-76, and claims for "negligent failure to warn" of this danger, *see id.* at 1476, as well as derivative claims brought by his spouse, *see id.*, were not premised upon "commercial activity" by Saudi Arabia within the meaning of § 1605(a)(2). *See id.* at 1478-1481. The Court stated:

> We emphasized in *Weltover* that whether a state acts "in the manner of" a private party is a question of behavior, not motivation:
>
> > "[B]ecause the Act provides that the commercial character of an act is to be determined by reference to its 'nature' rather than its 'purpose,' the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in "'trade and traffic or commerce.'" *Weltover, supra*, at __, 112 S. Ct., at 2166 (citations omitted) (emphasis in original).

> We did not ignore the difficulty of distinguishing "'purpose' *(i.e.,* the *reason* why the foreign state engages in the activity) from 'nature' (i.e., the outward form of the conduct that the foreign state performs or agrees to perform)," but recognized that the [FSIA] "unmistakably commands" us to observe the distinction. 504 U.S., at ___, 112 S. Ct., at 2167 (emphasis in original).

Nelson, 113 S. Ct. at 1479. Because the exercise of police power had historically been understood to be a "peculiarly sovereign" function, the Court concluded that the plaintiffs had failed to state a claim based upon § 1605(a)(2) "commercial activity." *Id.*

Weltover was an action brought by bondholders for breach of contract in response to a unilateral rescheduling of the bond payments by the Republic or Argentina. 112 S. Ct. at 2163-64. The unanimous Court ruled that Argentina's rescheduling of this debt was undertaken "in connection with a commercial activity" of Argentina, and had a "direct effect [upon bondholders] in the United States," within the meaning of the third clause of § 1605(a)(2). *Weltover*, 112 S. Ct. at 2165-69. The Court noted that the bonds were "garden-variety debt instruments" (1) held by private parties (2) freely negotiable (except in Argentina), and (3) the source of a stream of cash income over time. *Id.* at 2166. Argentina contented that the bonds had been issued "to address a domestic credit crisis, and as a component of a program designed to control that nation's critical shortage of foreign exchange." *Id.* at 2167. The Court responded that under the definition of "commercial activity" provided by § 1603(d), which direct attention to the "nature," rather than the "purpose," of the activity under examination, "it is irrelevant *why* Argentina participated in the bond market in the manner of a private actor; it matters only that it did so." *Id.*

In the present case, the district court concluded that the third clause of § 1605(a)(2) applied because "[w]hen [the Emirate] took over and provided for the management of

[Union]," *Drexel VII*, 810 F. Supp. 1387, and "[w]hen the Committee marshalled, managed, and liquidated Galadari's assets," *id.*, they engaged in commercial activities outside the United States that could be conducted by a private party, and in fact had been performed by Galadari. *See id.*

We agree that these activities might be regarded as commercial,[3] but they are not activities that "cause[d] a direct effect in the United States," § 1605(a)(2), upon which the claims of Drexel and Refco are based. Drexel and Refco do not claim that Union was mismanaged and that this had some detrimental "effect" upon them in the United States. Nor do they contend that the management of Galadari's assets by the Committee generated such an effect. Rather, their claims, explicitly set forth in their amended and supplemental complaints, are that (1) the Committee and the Emirate were responsible as successors-in-interest for the liabilities of Galadari and Commodities, (2) the Committee and the Emirate had breached promises and representations to Drexel and Refco that their claims would be fairly adjudicated in the Dubai proceedings; and (3) the Committee's wrongful refusal to pay these claims constituted an illegal taking of property without just compensation in violation of international law. The gravamen of these claims concerns the essentially judicial role of the Committee in marshalling the assets of Galadari and Commodities and adjudicating the claims of their creditors, including Drexel

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[3] Even the depiction of these activities as "commercial" is, however, suspect. *Cf. In re Beck Indus. (Rothberg v. Kirschenbaum)*, 725 F.2d 880, 887 (2d Cir. 1984) ("'Merely to attempt ot collect and liquidate the assets of a debtor is not to carry on its business in any proper sense of the term.'") (quoting *Austrian v. Williams*, 216 F.2d 278, 285 (2d Cir. 1954), *cert. denied*, 348 U.S. 953 (1955)); Accord, *In re Fidelity Mortgage Investors, Inc. (Fidelity Mortgage Investors v. Camelia Builders, Inc.)*, 550 F.2d 47, 57 (2d Cir. 1976) (quoting *Austrian*, 216 F.2d at 285), *cert. denied*, 429 U.S. 1093 (1977).

and Refco, and not any of the tangentially related commercial conduct in which the Committee or the Emirate might have engaged. *But see supra* note 3.

Drexel and Refco contend, on the contrary that the third clause of § 1605(a)(2) requires only that the foreign act that causes a direct effect in the United States occur "in connection with" a commercial activity, and (in effect) that the Committee's adverse adjudicative act was adequately connected to its assertedly commercial activities to satisfy the statute. They cite in this regard Nelson's observation that "Congress manifestly understood there to be a difference between a suit 'based upon' commercial activity [i.e., a suit brought under the first clause of § 1605(a)(2)] and one 'based upon' act performed 'in connection with' such activity [i.e. one brought under the second and third clauses of § 1605(a)(2)]." *Nelson*, 113 S. Ct. at 1478. They also invoke in support of their argument *L'Europeenne de Banque v. La Republica de Venezuela*, 700 F. Supp. 114, 119-120 (S.D.N.Y. 1988), and *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 709 n.10 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1812 (1993). We are unpersuaded.

The "acts" upon which the claims of Drexel and Refco are"based" are essentially the adverse determination of their claims by the Committee, including the determination that Galadari had not effectively pledged Union shares to Drexel as security for payment of the Note. As the Court stated in Nelson, the phrase "based upon" is "read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." 113 S. Ct. at 1477 (collecting cases). If the "connection" language of § 1605(a)(2) were read, as Drexel and Refco seek, to include tangential commercial activities to which the "acts" forming the basis of the claim have only an attenuated connection, the "commercial activity" exception would effectively be rewritten to authorize the exercise of jurisdiction over acts that are essentially sovereign in nature. *See Foremost-McKesson*, 905 F.2d at 450 (exception provided by third clause of § 1605(a)(2) inapplicable when "alleged commercial acts were subsumed within a sovereign activity"). We

do not read the Supreme Court's rulings in *Nelson* and *Weltover* to support such a construction of 1605(a)(2).

The cases cited by Drexel and Refco do not call for a different conclusion. *L'Europeenne* addressed only the "direct effect in the United States" language of the third clause of § 1605(a)(2), 700 F. Supp. at 121-22, and did not involve any adjudicative activity by the foreign entity that claimed FSIA immunity. *Siderman* noted that the "intervention and operation" of a foreign bank by a foreign entity could constitute § 1605(a)(2) "commercial activity." 965 F.2d at 709 n.10; *but see Baglab Ltd. v. Johnson Matthey Bankers Ltd.*, 665 F. Supp. 289, 294 (S.D.N.Y. 1987) ("The nationalization of a bank is a quintessential sovereign activity and may not serve as the basis for a suit against the Bank.") (citing *Alberti v. Empresa Nicaraguense*, 705 F.2d 250 (7th Cir. 1983); *Cary v. National Oil Corp.*, 453 F. Supp. 1097 (S.D.N.Y. 1978), *aff'd*, 592 F.2d 673 (2d Cir. 1979) (per curiam)). The case involved "causes of action arising out of the torture of Jose Siderman and the expropriation of the Sidermans' property by Argentine military officials." 965 F.2d at 702.

The decree that established the Committee specified that it was to be the exclusive arbiter of disputes concerning claims to Galadari's assets, including claims regarding purported security interests held in Union by Galadari's creditors. Neither the resolution of creditors' claims against the Galadari estate nor the determination of which Union creditors held valid security interest in that bank constituted activity that could have been performed by private parties.[4]

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[4] Our dissenting colleague confesses an inability to discern, under the unfamiliar laws and practices of Dubai, "whether the particular actions of the committee that caused injury to the plaintiffs really were judicial," invoking our observation eight years ago that "our courts have had no experience with Dubai bankruptcy practices and procedures." *Drexel II*, 777

(continued...)

Accordingly, § 1605(a)(2) does not strip the Committee and the Emirate of FSIA immunity in this action.

Conclusion

In view of the foregoing, we need not address the other issues considered by the district court. The order denying the motion to dismiss the amended and supplemental complaints is reversed; the district court is directed to dismiss the amended and supplemental complaints. The appeal form the order denying the Emirate's motion to quash discover is dismissed as moot.

JON O. NEWMAN, *Chief Judge*, dissenting:

The Court has ordered the dismissal, at the pleading stage, of a lawsuit that presents novel and subtle issues concerning complicated financial maneuverings in the Emirate of Dubai, United Arab Emirates ("Dubai"). Dismissal is ordered because the Court has concluded that the compiaint does not allege conduct by the defendants falling within the "commercial activity" exception of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(2) (1988). Instead, the Court holds, the conduct alleged to have been engaged in by Dubai and by a governmental established committee is sufficiently within a judicial role to be excluded from the "commercial activity" exception. Because I am persuaded that definitive decision as to the nature of the challenged conduct cannot fairly be made from the fact of the complaint, I would uphold the District Court's order

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[4](...continued)
F.2d at 881. In the interim, however, the Emirate has conducted lengthy proceedings that resulted in determinations adverse to Drexel and Refco. We do not consider ourselves at liberty to transmute these proceedings into a § 1605(a)(2) "commercial activity," whether or not we might be wholly satisfied as to their fairness after further discovery or a full trial.

denying the motion to dismiss the complaint and let the matter proceed, at least to the summary judgment stage, if not to trial. I therefore respectfully dissent.

The lawsuit concerns the efforts of creditors, The Drexel Burnham Lambert Group Inc. ("Drexel") and Refco, Inc., to enforce rights originally arising from loan transactions with Abdul Galadari, a citizen of Dubai, and A.W. Galadari Commodities ("Commodities"), a division of A.W. Galadari Holdings (Private) Ltd. As a result of extreme financial difficulties experienced by Galadari and companies owned or controlled by him, the government of Dubai issued a series of decrees that appear to blend two types of activities that would be regarded as distinct, had they been undertaken in the course of insolvency proceedings in this country. On the one hand, the decrees created an adjudicative body, The Committee of Receivers for A.W. Galadari, *et al.* ("the Committee"), to act in a capacity similar to that of a United States bankruptcy court or a state court administering insolvency of receivership proceedings. On the other hand, the decrees also invested the Committee with authority to take over and operate Galadari's ventures, and the government of Dubai provided the Committee with substantial funds to be used for the creditors of the failed ventures. In this latter capacity, the Committee appears to have been functioning less like an adjudicator and more like either a successful purchaser of assets at a liquidation proceeding or a new corporation emerging from a Chapter 11 reorganization.

Though the capacity in which the Committee acted is in sharp dispute, the effect of at least some of its actions is quite clear, notably the Committee's decision to devote much of the fresh funds form the government of Dubai to satisfy the claims of residents of Dubai and to decline to pay the notes of Drexel an Refco. Plaintiffs allege that the chairman of the Committee refused payment of Drexel's note on the ground that the note represented "gambling losses." *See Drexel, Burnham Lambert Group Inc. v. Committee of Receivers for A.W. Galadari*, 810 F. Supp. 1375, 1386-87 n.19 (S.D.N.Y. 1993) ("Drexel").

The District Court, in its careful and comprehensive opinion upholding the sufficiency of the complaint, demonstrated a sensitive awareness of the dual nature of the Committee's activity. Judge Motley wrote:

> While the Committee has served in a quasi-judicial capacity, the Committee has also acted in commercial and non-judicial capacities. This court's jurisdiction in this matter is based upon the latter.

Drexel, 810 F. Supp. at 1391. In rejecting the District Court's ruling, this Court too recognized that there are involved in this case some activities that are essentially judicial and some that "might be regarded as commercial." ___ F.2d at ___ (opinion at 30.)

My disagreement with the Court arises because I lack the Court's ability to determine, from the face of the complaint alone, how to categorize the activities of a body created by the sovereign decree of a foreign state with whose laws and practices I have no familiarity. At an earlier stage of this litigation, we observed that "[b]ecause the Dubai decree appears to be Dubai's first attempt to frame an insolvency law, our courts have had no experience with Dubai bankruptcy practices and procedures." *Drexel Burnham Lambert Group Inc. v. Galadari*, 777 F.2d 877, 881 (2d Cir. 1985). That deficiency has not been remedied.

The Court is able to place all of the activities underlying the plaintiffs' claim on the judicial side of the line between judicial and commercial activities only by making what I regard as a somewhat imprecise generalizaTion. The Court says:

> The *gravamen* of these claims *concerns the essentially* judicial role of the committee in marshalling the assets of Galadari and Commodities and adjudicating the claims of their creditors, including Drexel and Refco, and not any of the tangentially related commercial conduct in which the Committee of the Emirate might have engaged.

___ F.2d at ___ (opinion p. 31) (emphasis added).

Upon a development of the facts, assessed against an informed understanding of the law of Dubai in the field of creditors' rights and insolvency proceedings, it would be possible to know not simply what is a the "gravamen" of the plaintiffs' claims, or what those claims "concern," or whether the Committee's role was "essentially" judicial. Instead, we would be in a position to know precisely what occurred, what the claims really are, and whether the particular actions of the committee that caused injury to the plaintiffs really were judicial. Perhaps the Committee adjudicated" the claims of Drexel and Refco and denied them, acting like a United States bankruptcy judge. But it is also possible that the Committee, acting like a successor corporation, used fresh cash from its "parent" entity to prefer some of its creditors and simply reneged on an enforceable obligation to discharge liabilities to the plaintiffs. I do not know which occurred, but I would give the plaintiffs an opportunity to develop evidence to show that their interpretation of the events is correct.

It is premature and unfair to dismiss the complaint at this time.

MANDATE

United States Court of Appeals

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 29th day of November, one thousand nine hundred and ninety-three.

PRESENT: HON. J. EDWARD LUMBARD,
HON. JON O. NEWMAN,*
HON. J. DANIEL MAHONEY

Circuit Judges.

THE DREXEL BURNHAM LAMBERT GROUP, INC., and REFCO, INC.,

Plaintiffs-Appellees,

-against-

THE COMMITTEE OF RECEIVERS FOR A.W. GALADARI, and THE EMIRATE OF DUBAI, UNITED ARAB EMIRATES,

93-7078
93-7086

Defendants-Appellants,

-and-

A.W. GALADARI, and A.W. GALADARI COMMODITIES, a division of A.W. Galadari Holdings (Private) Limited,

Defendants.

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* Judge Newman became Chief Judge of the Second Circuit Court of Appeals on July 1, 1993.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ORDERED, ADJUDGED and DECREED that the order of the district court denying the motion to dismiss the amended and supplemental complaints is reversed. The appeal from the order denying the Emirate's motion to quash discovery is dismissed as moot in accordance with the opinion of this court.

GEORGE LANGE III, Clerk
By:

/s/ Edward J. Guardaro
Edward J. Guardaro
Staff Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE DREXEL BURNHAM LAMBERT GROUP INC.,
Plaintiff,

84 Civ. 2602 (CBM)

- against -

COMMITTEE OF RECEIVERS FOR A.W. GALADARI, ET AL.; THE EMIRATE OF DUBAI, UNITED ARAB EMIRATES; A.W. GALADARI; A.W. GALADARI COMMODITIES, a division of A.W. GALADARI HOLDINGS (PRIVATE) LIMITED,
Defendants.

OPINION

REFCO, INC.,
Plaintiff,

90 Civ. 2140 (CBM)

- against -

ABDUL WAHAB BIN EBRAHIM GALADARI, A.W. GALADARI COMMODITIES, A.W. GALADARI HOLDINGS (PRIVATE), LTD., THE COMMITTEE OF RECEIVERS FOR ABDUL WAHAB BIN EBRAHIM GALADARI, A.W. GALADARI COMMODITIES and A.W. GALADARI HOLDINGS (PRIVATE), LTD., and THE EMIRATE OF DUBAI, UNITED ARAB EMIRATES,
Defendants.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

THE DREXEL BURNHAM LAMBERT GROUP INC.,

Plaintiff, 84 Civ. 2602(CBM)

- against -

COMMITTEE OF RECEIVERS FOR A.W. GALADARI, ET AL.; THE EMIRATE OF DUBAI, UNITED ARAB EMIRATES; A.W. GALADARI; A.W. GALADARI COMMODITIES, a division of A.W. GALADARI HOLDINGS (PRIVATE) LIMITED,

Defendants.

REFCO, INC.

Plaintiff, 90 Civ. 2140(CMB)

- against-

ABDUL WAHAB BIN EBRAHIM GALADARI; A.W. GALADARI COMMODITIES; A.W. GALADARI HOLDINGS (PRIVATE), LTD.; THE COMMITTEE OF RECEIVERS FOR ABDUL WAHAB BIN EBRAHIM GALADARI; A.W. GALADARI COMMODITIES and A.W. GALADARI HOLDINGS (PRIVATE), LTD., and THE EMIRATE OF DUBAI, UNITED ARAB EMIRATES,

Defendants.

- -x

MEMORANDUM OPINION

I. INTRODUCTION

Defendants The Emirate of Dubai ("Dubai") and The Committee of Receivers for A.W. Galadari, et al ("the Committee") separately move to dismiss the amended and supplemental complaints of the plaintiffs The Drexel Burnham Lambert Group Inc. ("Drexel") and Refco, Inc. ("Refco"). Both motions, of Dubai and of the Committee, are denied.

Plaintiffs Drexel and Refco move jointly for security against Dubai and the Committee for costs, judgment, and potential sanction. Drexel's motion, as to costs not including attorneys fees, is granted. Security covering the judgment and possible sanctions is denied as to both Drexel and Refco.

II. BACKGROUND

Plaintiffs in these consolidated actions seek damages from the government of Dubai, a sovereign government which political subdivision of the United Arab Emirates ("U.A.E."), and the Committee, an agency or instrumentality of the government of Dubai. Plaintiffs base their claims on (a) governmental acts performed by the government of Dubai in Dubai and (b) acts of the Committee on the purported grounds that the government of Dubai was the "alter ego" of the Committee.

The activities undertaken directly by the government of Dubai were the issuance of official Decrees in 1983 and 1984 by the then Deputy Ruler and the initiation of its purchase of what ultimately proved to be approximately 80% of the outstanding shares of the Union Bank of the Middle East ("UBME") in connection therewith. The Decrees were promulgated in response to the severe financial and economic problems which had arisen in Dubai as a result of the insolvency of defendant Galadari, a resident of Dubai, and companies owned or controlled by Galadari.

In February 1983, Galadari and Galadari Commodities ("Galadari") opened a number of trading accounts with Refco, an Illinois corporation. As of November 1983, Refco alleges that Galadari owned a debt of $4,609,664.20. Drexel originally brought an action for breach of contract in connection with a promissory note ("Note"). The Note was made in favor of

Drexel Burnham Lambert International N.V. ("Drexel International") which was organized in the Netherlands Antilles and has its administrative offices in London, England. The Note, in the amount of $19,465,000.00, was executed on September 14, 1982, by defendant A.W. Galadari, both personally and on behalf of defendant A.W. Galadari Commodities, which was described as a partnership that Mr. Galadari managed. The Note was assigned to Drexel by Drexel International on October 28, 1982, the principal having been reduced by payment to $12,465,000.00, was secured by 6,068,640 shares of the UBME, a bank which Galadari controlled.

Meanwhile, in Dubai, Galadari was having severe financial problems stemming from the mismanagement of the UBME. On November 12, 1983, pursuant to a decree from the sovereign of Dubai (Decree No. 5), a Provision Board of Directors of the UBME was created to manage the UBME. *See The Drexel Burnham Lambert Group, Inc. v. Galadari*, 84 Civ. 2602, 1987 U.S. Dist. Lexis 5030 (S.D.N.Y. Jan. 10, 1987) ("*Galadari II*") at ¶ 18. Decree No. 5 provided for the vesting of the assets of Galadari and his companies in the Provisional Board, imposed a moratorium freezing all liabilities and began the liquidation of Galadari's assets.[1]

On April 17, 1984, Dubai issued Decree No. 3.[2] Decree No. 3 provided for insolvency proceedings in Dubai against Galadari and his companies by creating a Committee of

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[1] The Provisional Board was established to 1) act in place of the original board of directors in the day-to-day general management of the insolvent Union Bank, and 2) act as custodian of the non-banking business of A.W. Galadari. *Galadari II*, at ¶ 18.

[2] *See* Decree No. 3 of 1984 concerning the financial affairs of Abdul Wahab Ebrahim Galadari, Exh. 1 to Reinthaler Aff. in support of the Committee's motion to dismiss the amended and supplemental complaints of plaintiffs The Drexel Burnham Lambert Group Inc. and Refco Inc. ("Decree No. 3").

Receivers to continue the work of the Provisional Board in managing and liquidating the non-banking businesses of Galadari, empowering it to marshal and liquidate the assets of Galadari, empowering it to marshal and liquidate the assets of Galadari and his companies, to adjudicate claims against the debtor estates and to pay out valid claims from those assets. *See Galadari II*, at ¶ 26. The Committee established a set of procedures which would allow for the submission of creditor's claims.

The Committee consists of Mr. Rostamani, a member of the business community of Dubai, Mr. Abdulla Lootah who is in charge of the purchasing section of the Federal Ministry of Finance, Mr. Hassan Ibn al Sheikh, vice-chairperson of the Chamber of Commerce of Dubai and Mr. Nabil Aref, director of the marine and road section of the Federal Ministry of Public Works. *Galadari II*, at ¶ 67-71.

Since the Committee's inception it has marshalled and liquidated the assets of the estate and processed creditors claims. *Galadari II*, at ¶ 72. Since the Committee's inception over 700 claims have been submitted in the aggregate amount of $770,000,000. *See* Declaration of Nabil Aref, dated Sept. 6, 1990, Exh. 12 to Reinthaler Aff. at ¶ 6. Both Drexel and Refco have participated in the proceedings before the Committee in Dubai seeking recovery of debts owed by Galadari.

The central claims in the amended and supplemental complaint against Dubai and the Committee are that through the issuance of Decree No. 3 (and the creation of the Committee to assume control and to marshal, liquidate and distribute the assets of Mr. Galadari and his various businesses), Dubai and the Committee confiscated the security interest and claims of Drexel and Refco.

This court has rendered several prior opinions which give more detailed background as to these proceedings.[3]

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[3] *See Drexel Burnham Lambert Group, Inc. v. Galadari*, Nos. 84 Civ. 2602, 90 Civ. 2140, 1991 U.S. Dist. Lexis 4575, Apr.

(continued...)

Familiarity with these opinions is assumed for the purposes of this opinion. This matter is currently before the court on the motions of Dubai and the Committee to dismiss the amended and supplemental complaint of Drexel and Refco and on the motion of Drexel and Refco for a security against Dubai and the Committee to secure costs, judgment, and possible sanctions. These motions follow this court's June 1991 lifting of a stay that it had entered on January 29, 1987 and January 4, 1991 pending proceedings in Dubai.[4]

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[3](...continued)
8, 1991; *Drexel Burnham Lambert Group, Inc. v. Galadari*, Nos. 84 Civ. 2602, 90 Civ. 1241, 1991 U.S. Dist. Lexis 3612, March 26, 1991; *Refco v. Galadari*, 755 F. Supp. 79 (S.D.N.Y. 1991); *Drexel Burnham Lambert Group, Inc. v. Galadari*, No. 84 Civ. 2602, 1987 U.S. Dist. Lexis 5030, Jan. 29, 1987; *Drexel Burnham Lambert Group, Inc. v. Galadari*, No. 84 Civ. 2602, slip opinion, Apr. 17, 1986; *Drexel Burnham Lambert Group, Inc. v. Galadari*, 610 F. Supp. 114 (S.D.N.Y.), *aff'd in part and vacated in part* , 777 F.2d 877 (2d Cir. 1985).

[4] *See The Drexel Burnham Lambert Group, Inc. v. Galadari*, Nos. 84 Civ. 2602, 90 Civ 2140, *Order Vacating The Stays of Proceedings*, S.D.N.Y., *filed* June 28, 1991. *See also Drexel Burnham Lambert Group, Inc. v. Galadari*, Nos. 84 Civ. 2602, 90 Civ 2140, *Opinion Re Vacating the Stay: Findings of Fact And Conclusions of Law*, 1991 U.S. Dist. Lexis 3612, S.D.N.Y., March 25, 1991; *The Drexel Burnham Lambert Group, Inc. v. Galadari*, Nos. 84 Civ. 2602, 90 Civ 2140, *Supplemental Opinion Re Vacating the Stay: Supplemental Findings of Fact And Conclusions of Law*, S.D.N.Y., Apr. 8, 1991.

III. SUBJECT MATTER JURISDICTION

A. FOREIGN SOVEREIGN IMMUNITIES ACT

1. Background/History of FSIA

The Foreign Sovereign Immunities Act ("the FSIA") was passed by Congress in 1976 to codify standards for the judicial treatment of foreign sovereigns and their agencies and instrumentalities.[5] For more than a century and a half prior to the enactment of the FSIA, courts in this country had generally granted complete immunity to foreign sovereigns or deferred to the decisions of the Executive Branch. *See Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486-87, 103 S.Ct. 1962, 76 L.Ed 2d 81 (1983) (FSIA not unconstitutional in authorizing foreign plaintiff to sue foreign state in federal court on nonfederal claim).

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[5] Title 28 U.S.C. § 1330 provides:

(a) The district courts shall original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under section 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts jurisdiction under subsection (a) where service has been made under section 1608 of this title.

In 1952, the State Department adopted the Tate Letter,[6] calling for the application of a "restrictive" theory of foreign sovereign immunity. The restrictive theory of sovereign immunity allows immunity for public acts of a foreign sovereign while the commercial acts or private acts of a foreign sovereign are not immune. *Verlinden*, 461 U.S. at 487; *See also Jet Line Services, Inc. v. M/V Marsa El Hariga*, 462 F. Supp. 1165, 1169 (D.Md 1978). Because the restrictive theory was not initially codified, court decisions regarding immunity were made upon recommendations from the State Department that were often shaped by diplomatic pressures from foreign nations. As a result, the case-by-case application of the restrictive theory in matters involving foreign sovereign immunity lacked uniformity and equity. *See Verlinden*, 461 U.S. at 487-88. Congress, therefore, passed the FSIA in order to free the Government from the case-by-case diplomatic pressures of Executive Branch directed determinations, to clarify the applicable standards, and to ensure due process in matters involving foreign sovereigns. *Verlinden*, 461 U.S. at 488; *See also Jet Line Services*, 462 F. Supp. at 1170.

The FSIA codifies as federal law the restrictive theory of sovereign immunity. *Verlinden*, 461 U.S. at 488. In most instances, foreign states are immune from the jurisdiction of the United States courts. Exceptions to that general rule include cases in which the foreign state has explicitly or implicitly waived its immunity or in which the foreign state has engaged in commercial activity or when one of the other specified exceptions of the FSIA applies. *Verlinden*, 461 U.S. at 488. In such exceptional cases, the foreign state is "liable in the same manner and to the same extent as a private individual

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[6] Letter from Jack B. Tate, Acting Legal Adviser, Department of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), *reprinted in* 26 Dept. of State Bull. 984-985 (1952), and in *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 711, 96 S.Ct. 1854, 48 L.Ed 2d 301 (1976) (Appendix 2 to opinion of White, J.).

under like circumstances." *Verlinden*, 461 U.S. at 488-89 (*quoting* FSIA 28 U.S.C. § 1606).

2. FSIA Is Sole Source of Jurisdiction--Dubai Law Does Not Apply

The FSIA provides the sole basis for jurisdiction in matters involving a foreign sovereign or its agent or instrumentality. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 109 S.Ct. 683, 102 L.Ed 2d 818 (1989). In *Argentine Republic*, which involved a suit for damage done to a Liberian oil tanker that was attacked by Argentine military aircraft during the war between Great Britain and the Argentine Republic over the Falkland Islands, the Supreme court ruled that "the text and structure of the FSIA demonstrate Congress' intention that the FSIA be the sole basis for obtaining jurisdiction over a foreign state in our courts." *Argentine Republic*, 488 U.S. at 434; *Republic of Argentina and Banco Central de la Republica Argentina v. Weltover, Inc.*, 504 U.S., 112 S.Ct. __, 119 L.Ed 2d 394, 403 (1992) ("The FSIA provides the 'sole basis' for obtaining jurisdiction over a foreign sovereign in the United States"). In determining that the FSIA provides the sole basis for jurisdiction, the Court ruled out the applicability of other statutes to cases involving a foreign sovereign or its instrumentality. For example, the Court ruled that neither the Alien Tort Statute[7] nor general admiralty and maritime law could be applied to determine jurisdiction in such cases. *Argentine Republic*, 488 U.S. at 439.

Defendant Committee of Receivers argues in this case that Dubai law should apply for jurisdictional purposes. The

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[7] The Alien Tort Statute provides:

> The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

28 U.S.C. § 1350.

Committee asserts that Article 9 of Decree No. 3e[8] immunizes the Committee from liability in this court. Dubai law and Decree No. 3, however, do not apply here and are not relevant to this issue. In addition to the Supreme Court's decision in *Argentine Republic*, holding that the FSIA is the sole basis for jurisdiction, the Second Circuit held in *Letelier v. Republic of Chile*, 748 F.2d 790 (2d Cir. 1984) that the FSIA is "the exclusive source of subject matter jurisdiction over all suits involving foreign states or their instrumentalities." *Letelier*, 748 F.2d at 793 (involving suit against the Republic of Chile and Chilean nationals that Chilean government refused to extradite who had been indicted for the assassination of the former Chilean Ambassador to the United States and his wife) (*citing Rex v. CIA Pervana de Vapores, S.A.*, 660 F.2d 61, 62 (3d Cir. 1981), *cert. denied* 456 U.S. 926, 102 S.Ct. 1971, 72 L.Ed.2d 441 (1982)). It is therefore clear from the decisions in *Argentine Republic* and *Letelier* that Dubai law cannot be applied to the question of jurisdiction. Subject matter jurisdiction in this case is governed by the FSIA and its specific exceptions to immunity.

B. COMMITTEE AND DUBAI HAVE BURDEN OF PROVING ENTITLEMENT TO IMMUNITY

In asserting that this court lacks subject matter jurisdiction, defendants' have the burden of proving that the exceptions posed by plaintiffs do not apply. *See, e.g., Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 707-08 (9th Cir. 1992); *see also L'Europene de Banque v. La Republica de Venezuela*, 700 F. Supp. 114, 119 (S.D.N.Y. 1988) ("Under the FSIA, defendants bear the evidentiary burden of demonstrating that the exceptions are not applicable"). *Siderman* involved a suit against the Republic of Argentina and the Argentine Province of Tucuman for the torture and expropriation of property of one

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[8] Article 9 of Decree No. 3 provides:

> No liability personal or otherwise shall attach to the . . . Committee, or their advisors and agents . . . in respect of acts performed in accordance with this Decree.

of its citizens. The Ninth circuit noted that when the allegations in the complaint bring claims within an FSIA exception, the burden shifts to the foreign state of instrumentality to prove that any relevant exceptions do not apply. *Siderman*, 965 F.2d at 707-08. "'Once the plaintiff offers evidence that an FSIA exception to immunity applies, the party claiming immunity bears the burden of proving by a preponderance of the evidence that the exception does not apply.'" *Siderman*, 965 F.2d at 708 (*quoting Schoenberg v. Exportadora de Sal, S.A. de C.V.*, 930 F.2d 777 (9th Cir. 1991) (*quoting Joseph v. Office of the Consulate Gen'l of Nigeria*, 830 F.2d 1018, 1021 (9th Cir. 1987) *cert. denied*, 485 U.S. 905, 108 S.Ct. 1077, 99 L.Ed.2d 236 (1988))).

Plaintiffs, however, are not wholly without responsibility in resolving the issue of subject matter jurisdiction. The burden of proof is a shifting burden which ultimately falls upon the party claiming immunity.[9] Once a party has established that it is a foreign state within the meaning of the FSIA and potentially entitled to immunity, the burden shifts to the opposing party to raise the applicable exceptions to sovereign

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[9] The legislative history of the FSIA suggests a shifting burden of proof:

> [T]he burden will remain on the foreign state to produce evidence in support of its claim of immunity. Thus, evidence must be produced to establish that a foreign state or one of its subdivisions, agencies or instrumentalities is the defendant in the suit and that the plaintiff's claim relates to a public act of the foreign state -- that is, an act not within the exceptions in section 1605-1607. Once the foreign state has produced such *prima facie* evidence of immunity, the burden of going forward would shift to the plaintiff to produce evidence establishing that the foreign state is not entitled to immunity. The ultimate burden of proving immunity would rest with the foreign state.

H.R. Rep. No. 1487, 94 Cong., 2d Sess. 1, 17, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6604, 6616.

immunity and supporting facts. *Stena Rederi AB v. Comision de Contratos del Comite Ejecutivo General del Sindicato Revolucionari de Trabajodores Petroleros de la Republica Mexicana*, 923 F.2d 380, 390 n. 14 (5th Cir. 1991) (In suit for breach of contract and negligent misrepresentation against nationalized Mexican petroleum company and business entity, plaintiff must raise applicable exception to immunity). Upon a demonstration of the applicable exceptions, the ultimate burden shifts back to the foreign state to prove that the exceptions raised do not apply. *Stena Rederi*, 923 F.2d at 390 n. 14; *see also Forsythe v. Saudi Arabian Airlines Corp.*, 885 F.2d 285, 289 n. 6 (5th Cir. 1989) (While plaintiffs had burden of production subsequent to foreign state's *prima facie* immunity, "the ultimate burden of persuasion remained at all times on [the foreign state]"); *Vencedora Oceanica Navigacion v. Compagnie Nationale Algerienne de Navigation*, 730 F.2d 195, 199 (5th Cir. 1984) (party claiming FSIA immunity has burden of proving nonapplicability of exceptions). *See, e.g., Transamerican Steamship Corp. v. Somoai Democratic Republic*, 767 F.2d 998, 1003 (D.C. Cir. 1985) (where foreign state failed to sustain burden of proving inapplicability of exception, district court had jurisdiction); *Alberti v. Empresa Nicaraguense de la Carne*, 705 F.2d 250, 253 (7th Cir. 1983) ("It is uncontested that defendants bear this burden of establishing their immunity from suit").

In this case, both defendant Committee and defendant Dubai have met their burden of demonstrating a *prima facie* entitlement to immunity by establishing that they are "foreign state[s]"[10] within the meaning of the FSIA. *See Refco, Inc.*

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[10] FSIA § 1603 states:

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(continued...)

v. Galadari, 755 F. Supp. 79, 82 (S.D.N.Y. 1991) ("This court . . . finds that the Committee is an agency or instrumentality of a foreign state"). Plaintiffs, however, have met their subsequent burden of presenting evidence indicating the applicability of an exception to immunity provided for in the FSIA.[11] The ultimate burden, therefore, now falls on the defendants to prove to the court the inapplicability of any of the FSIA exceptions.

C. DEFENDANT, COMMITTEE, IMPLICITLY WAIVED IMMUNITY

One of the FSIA exceptions to immunity that plaintiffs raise is the waiver exception. The FSIA § 1605(a) provides:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case --

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[10](...continued)

(b) An "agency or instrumentality of a foreign state" means any entity –

> (1) which is a separate legal person, corporate or otherwise, and
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> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

[11] Plaintiffs claim defendants have waived immunity. FSIA § 1605 (a)(1). Plaintiffs claim defendants engaged in commercial activities. FSIA § 1605 (a)(2). Plaintiffs claim defendants engaged in a taking of property in violation of international law. FSIA § 1605 (a)(3).

> (1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver.

With regard to this provision, the first issue to be resolved is the constitution of an implied waiver. Upon that determination, the issue turns to whether the acts of the Committee and Dubai comprise an implicit waiver.

Shapiro v. Republic of Bolivia, 930 F.2d 1013 (2d Cir. 1991) involved an appeal from a district court's dismissal of a suit brought against the Republic of Bolivia for non-payment of a note. In concurring in the district court's opinion with regard to waiver and holding that suit brought by a foreign state in a particular matter did not constitute waiver of immunity with respect to associated but distinct claims,[12] the Second

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[12] The result in *Shapiro*, finding no implied waiver, is distinguished from the present case on its facts. In *Shapiro*, the Republic of Bolivia issued negotiable promissory notes guaranteed by the Central Bank of Bolivia in exchange for Starfighter jets. When the State Department refused the transfer of the jets, Bolivia requested the return of the notes. Not all of the notes were returned, however, and Bolivia brought suit in the Southern District of New York to recover the notes or compensable damages from the company handling the transfer of the jets. The district court ruled in Bolivia's favor and against the company on summary judgment, but, the company filed for chapter 7 bankruptcy without returning any of the outstanding notes.

Meanwhile, Shapiro, a holder of one of the outstanding notes, filed suit in the Southern District against Bolivia, the Bolivian Air Force, and the Central Bank of Bolivia because the Central Bank had refused payment of the note that he held.

(continued...)

Circuit defined the composition of an implied waiver under the FSIA. The court observed that "Federal courts have been virtually unanimous in holding that the implied waiver provision of Section 1605(a)(1) must be construed narrowly." *Shapiro*, 930 F.2d at 1017 (citations omitted). Referring to the legislative history of the FSIA, the court noted three specific examples of actions constituting an implied waiver. The court quoted the House Report which states:

> With respect to implicit waivers, the courts have found such waivers in cases where a foreign state has agreed to arbitration in another country or where a foreign state has agreed that the law of a particular country should govern a contract. *An implicit waiver would also include a situation where a foreign state has filed a responsive pleading in an action without raising the defense of sovereign immunity.*

H.R. Rep. No. 1487, 94th Cong., 2d Sess. 18, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6604, 6617 (*quoted in Shapiro*, 930 F.2d at 1017) (emphasis added). The court in *Shapiro* observed that '[t]hese examples involve circumstances in which the waiver was unmistakable, and courts have been reluctant to find an implied waiver where the circumstances were not similarly unambiguous." *Shapiro*, 930 F.2d at 1017. According to *Shapiro*, then, filing a responsive pleading

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[12](...continued)

The Second Circuit held that Bolivia's suit to recover its notes from the company did not constitute waiver for the purposes of the FSIA in a separate suit brought against Bolivia by a third party concerning a separate related transaction. (The court, nevertheless went on to hold that Bolivia was not immune because it had engaged in commercial activity.)

The case here, however, involves no suit by a third party and stems from one set of transactions -- the failure of Drexel and Refco to be satisfied in the repayment of the debts owned to them by Galadari.

without raising the defense of sovereign immunity constitutes an "unambiguous" implied waiver of immunity.

In addition to the Second Circuit's decision in *Shapiro*, there is other support for finding an implied waiver where a foreign state files responsive pleadings without preserving its immunity. In considering an appeal of the district court's granting a motion to dismiss on sovereign immunity grounds, the Second Circuit in *Canadian Overseas Ores LTD v. Compania de Acero del Pacifico S.A.*, 727 F.2d 274 (2d Cir. 1984) noted that "sovereign immunity is an 'affirmative defense which must be specially pleaded' for a court to consider it." *Canadian Overseas Ores*, 727 F.2d at 277. Where a foreign state responds without specifically pleading the sovereign immunity defense, it implicitly waives its immunity; the filing of a pleading is the point of "no return" for asserting sovereign immunity. *Canadian Overseas Ores*, 727 F.2d at 277.[13] *See also Harris v. VAO Intourist, Moscow*, 481 F. Supp. 1056, 1058 (S.D.N.Y. 1979) (quoting House Report for proposition that responsive pleading without immunity defense constitutes waiver); *Aboujdid v. Singapore Airlines, LTD*, 67 N.Y.2d 450, 494 N.E.2d 1055, 503 N.Y.S.2d 555 (Ct. App. 1986) ("An entity otherwise entitled to sovereign immunity under the FSIA which serves an answer asserting not only a number of affirmative defenses other than sovereign immunity but also a counterclaim against plaintiffs and their counsel, and in furtherance of its position utilizes a number of procedural devices before attempting some four and a half years after commencement of the litigation to amend its answer to assert the immunity defense, waives immunity. . ."); *Coporacion Venezolana de Fomento v. Vintero Sales Corp.*, 477 F. Supp. 615, 619 n. 9 (S.D.N.Y. 1979), *rev'd on other grounds*, 629

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[13] While the court in *Canadian Overseas Ores* held that the Chilean corporation had not waived its immunity by filing various *motions*, the court concluded that "the defense of sovereign community is lost if not made in the first responsive *pleadings*." *Canadian Overseas Ores*, 727 F.2d at 277 (emphasis added).

F.2d 786 (2d Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981) (where defendant did not raise sovereign immunity defense in responsive pleadings, defendant implicitly waives immunity).

Having firmly established that participation in litigation without claiming sovereign immunity constitutes waiver, the next task is to determine whether or not the Committee has waived its immunity in this case.

1. The Committee Entered As Party To Litigation

The procedural history of this case indicates that the Committee has not met its burden of proving that the FSIA waiver exception is inapplicable. The original claims of Drexel and Refco were against Galadari, a private citizen of Dubai. When Galadari experienced financial trouble that the government of Dubai felt warranted intervention, Dubai established the Provisional Board and then the Committee, which voluntarily intervened as an agent of Dubai on behalf of Galadari and Galadari's company, Commodities, in these proceedings.

Since entering this litigation, the Committee has actively participated in defending Galadari and Commodities against the claims of Drexel and Refco. Rather than making a special pleading, which the Second Circuit in *Canadian Overseas Ores* noted was necessary to preserve immunity,[14] the Committee made a general appearance in this action in 1984, as found by the Second Circuit in *Drexel Burnham Lambert Group, Inc. v. Galadari*, 777 F.2d 877, 880 (2d Cir. 1985):

> In response to Drexel's suit upon the promissory note, the Committee appeared generally and asserted twenty-five affirmative defenses.

In other words, the Committee pleaded everything that it could think of to derail Drexel's claim, but it did not plead sovereign immunity.

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[14] *Canadian Overseas Ores*, 727 F.2d at 277 ("sovereign immunity is an 'affirmative defense which must be specifically pleaded'").

Similarly, in the Refco action, the Committee appeared in 1984 and opposed Refco's motion for an order of attachment without raising the issue of sovereign immunity. (Plaintiffs' Joint Memorandum of Law in Opposition to Defendants' Motions to Dismiss the Amended and Supplemental Complaints ("Pls. Opp. Mot. Dis.") at 18). The Committee argued that Refco's motion should be denied or stayed upon comity principles. Pls. Opp. Mot. Dis. at 18. The Committee succeeded in obtaining Refco's agreements to adjourn the action based on its continuing representations to Refco that Refco's claim be considered together with Drexel's and that Refco could rely on the Committee's dealings with Drexel as if they were dealing with Refco. Pls. Opp. Mot. Dis. at 18. In fact, because of the Committee's participation in the state court proceedings brought by Refco, the New York court acted to add the Committee, *sua sponte*, as a party to the case. *See* Memorandum of Law in Support of the Committee of Receivers Motion to Dismiss ("Comm. Mot. Dis.") at 36.

Moreover, this court determined that the Committee is a party in this litigation in ruling on Drexel's application for a preliminary injunction. This court noted that neither of the named defendants, Galadari or Commodities, had appeared; rather the Committee "appeared" and answered instead. *See The Drexel Burnham Lambert Group, Inc. v. Galadari*, 84 Civ. 2602, slip opinion, April 17, 1986 ("*Galadari I*") at 1.

2. Dubai And The Committee Are The "Real Parties In Interest" As To Galadari's Assets

The Committee argues that it entered this litigation solely on behalf of Galadari and his companies and that it was not essential for the Committee to raise the immunity defense until the Committee had appeared on its own behalf, "qua Committee." This argument is unpersuasive, however, because the Committee and Dubai are the "real parties in interest" in this litigation.

The term "real party in interest" generally refers to "the one who, under the applicable substantive law, has the legal right which is sought to be enforced or is the party entitled to bring suit." *In re Comcoach Corp.*, 698 F.2d 571, 573 (2d Cir.

1983). When Dubai assumed control of the UBME, it because the real party in interest as to those assets.

In *Banco Nacional de Cuba v. Chemical Bank New York*, 658 F.2d 903, 910-11 (2d Cir. 1981), the Second Circuit held that a country that expropriated a private bank and assigned management of the bank to an agent, was the real party in interest as to the bank. Here, therefore, Dubai, which took control of the UBME and assigned its management to the Provisional Board, is the real party in interest as to Galadari's banking interest, some of which were used to secure the Drexel Note.

When the Committee assumed the responsibility of marshalling and liquidating Galadari's assets, it became the real party in interest as to those assets. Under New York law, a liquidator is the real party in interest as to the assets and interests for which he or she is responsible. *See, e.g., United States Fidelity & Guaranty Company v. Executive Ins. Co.*, 893 F.2d 517, 518 n. 1 (2d Cir. 1990) (appointed liquidator is real party in interest).

In *Fabe v. Aneco Reinsurance Underwriting Ltd.*, 784 F. Supp. 448 (S.D. Ohio 1991), a district court in another circuit confronted a similar situation. In *Fabe*, the liquidator of an oil and gas insurance company brought suit against the liquidators of the defendant reinsurance company who were appointed by the Chief Justice of the Supreme Court of Bermuda to marshal the assets of the reinsurance company and wind up its affairs. In this context, the court determined that "once [the reinsurance company] was ordered into liquidation, the real party in interest in this action became, not the corporation, but the liquidators of the corporation appointed by the Supreme Court of Bermuda." *Fabe*, 784 F. supp. at 450.

Similarly, the Committee, appointed as liquidator to marshal and wind up the affairs of Galadari and his companies, is the real party in interest as to Galadari's non-banking assets. The court in *Fabe* noted that the "liquidators are vested with all interests and property of the estate in liquidation and legal proceedings may be prosecuted or defended in the liquidator's name." *Fabe*, 784 F. Supp. at 450. The Committee, when it

appeared as liquidator of Galadari's assets, appeared as the real party in interest, "qua Committee." Because it failed to raise the defense of sovereign immunity when it appeared and responded as real party in interest, the Committee waived its immunity.

Because the Committee voluntarily intervened as the real party in interest in both federal and state proceedings and filed responsive pleading without preserving its right to sovereign immunity, the Committee has failed to meet its burden of proving that it did not implicitly waive its right to immunity. Additionally, because Dubai is the real party in interest as to Galadari's banking assets and appeared through its agent the Committee without preserving immunity, Dubai has failed to meet its burden of proving that it did not implicitly waive immunity. This court, therefore, has subject matter jurisdiction under the waiver exception of the FSIA as to both the Committee and Dubai.

D. DEFENDANTS, COMMITTEE AND DUBAI, ARE NOT IMMUNE FROM JURISDICTION BECAUSE IT ENGAGED IN COMMERCIAL ACTIVITY HAVING A DIRECT EFFECT IN THE UNITED STATES

While the applicability of only one of the FSIA exceptions is sufficient for subject matter jurisdiction, it should be noted that the commercial activity exception is also a factor in this case. Another of the FSIA exceptions to immunity that plaintiffs raise is the commercial activity exception. The FSIA § 1605(a) provides that a foreign state is not immune from suit in any case

> in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

FSIA § 1605(a)(2).

> "Commercial activity" is defined in the FSIA aseither a regular course of commercial conduct or a particular transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

FSIA § 1603(d).

In *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981), which involved breach of contract claims brought by suppliers of Portland cement against the nation of Nigeria, the Second Circuit set some of the parameters of "commercial activity." The court determined that the words "regular course of . . . conduct" in the FSIA definition of "commercial activity" should be interpreted broadly to encompass a wide ranges of acts as the relevant activities in a given matter. *Texas Trading*, 647 F.2d at 308.[15] In *Weltover*, the Supreme Court dealt with the issu-

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[15] It should be noted, as the court noted in *Texas Trading*, that the FSIA provides almost no guidance as to the meaning and scope of "commercial." While "commercial activity" is defined as a regular course of commercial conduct or transaction, no provision of the FSIA defines "commercial." *See Texas Trading*, 647 F.2d at 308; *Weltover*, 119 L.Ed 2d at 404 (FSIA leaves "commercial" largely undefined).

In evaluating whether or not Nigeria had engaged in commercial activity in procuring cement to build that nation's infrastructure, the court in *Texas Trading* referred to three sources for standards of commercial activity with regard to Nigeria's repudiation of its contracts. The first source was statements from the legislative history concerning contracts. The second source was the case law that existed at the time the FSIA was passed which indicated that immunity could not be "claimed with respect to acts or transactions that are commercial in nature, regardless of their underlying purpose." *Texas Trading*, 647 F.2d at 309 (*citing*

(continued...)

ance of debt instruments by the Argentine government. Referring to the Supreme Court's first decision concerning the FSIA in *Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 96 S.Ct. 1854, 48 L.Ed 2d 301 (1976),[16] the *Weltover* Court concluded:

> that when a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are "commercial" within the meaning of the FSIA.

Weltover, 119 L.Ed 2d at 405. Thus, if Dubai or the Committee pursued a course of conduct, transaction or act that a private player would pursue, then they engaged in commercial activity for the purpose of the FSIA exception.

In determining whether a course of conduct or a particular act or transaction is commercial activity, the court must look to

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[15](...continued)
Hearings on H.R. 3493 Before Subcommittee on Claims and governmental Regulations of the House Committee on the Judiciary, 93rd Cong., 1st Sess. 16 (1973) (testimony of Charles N. Brower, Legal Advisor, Department of State)). The third source was international law indicating that international law follows the restrictive theory which does not permit foreign states to claim immunity for their commercial acts and allows levying on commercial property for the satisfaction of judgments. *See Texas Trading*, 647 F.2d at 310, 310 n. 28.

[16] The Court in *Dunhill* held that a foreign state may not be entitled to immunity where suit was "based upon a foreign state's participation in the marketplace in the manner of a private citizen or corporation. A foreign state engaging in 'commercial' activities 'do[es] not exercise powers peculiar to sovereigns; rather, it 'exercise[s] only those powers that can also be exercised by private citizens.'" *Weltover*, 119 L.Ed 2d at 404-05 (*quoting Dunhill*, 425 U.S. at 698-705).

the nature of the activity rather than the purpose.[17] The Court in *Weltover* interpreted this statutory distinction to mean that

> the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in "trade and traffic or commerce."

Weltover, 119 L.Ed 2d at 405 (*quoting* BLACKS LAW DICTIONARY 270 (6TH ED 1990)). The question, then, is not whether the *purpose* of Dubai's and the Committee's activities was governmental or judicial; rather the question is whether the *nature* of the activities themselves were such that they could be performed by private parties.

In applying the commercial activity exception the first task is to define the relevant conduct. *Texas Trading*, 647 F.2d at 308. *See also Braka v. Bancomer*, 589 F.Supp. 1465, 1469 (S.D.N.Y. 1984). The commercial activities in this case all involve the marshalling, liquidating and winding up of Galadari's assets. Specifically, Dubai took over and provided for the management of the UBME, a private bank. The Committee, in addition to its quasi judicial function, managed and would up Galadari's non-banking businesses and assets. Many of these activities occurred outside of the United States, and thus, fall under the third clause of the commercial activity exception.

The Court in *Weltover* ruled that analysis of the third clause of the commercial activity exception involves the following

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[17] The FSIA § 1603(d) provides:

> The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

considerations: 1) whether the lawsuit is "'based ... upon an act outside the territory of the United States'; 2) that was taken 'in connection with a commercial activity' of [the foreign state] outside this country; and 3) that 'cause[d] a direct effect in the United States.'" *Weltover*, 119 L.Ed at 403 (*quoting* FSIA 28 U.S.C. § 1605(a)(2)).

1. Commercial Activity Claims Are Based Upon Acts Outside Of The Territory Of The United States

Many of the relevant acts of Dubai and the Committee took place outside of the United States. It is undisputed that Dubai took over and provided for the management, via the Provisional Board, of Galadari's private bank in Dubai.[18] It is undisputed that Dubai provided a sum of money to be paid to the UBME's creditors, many of whom were residents of Dubai.[19] It is undisputed that the Committee marshalled, managed, and liquidated Galadari's assets in Dubai and countries other than the United States.

2. The Acts Of Dubai And The Committee Were Taken In Connection With A Commercial Activity Outside Of The United States

The relevant acts of Dubai were not only acts outside of the territory of the United States, satisfying the first aspect of the requirements of the third clause of the commercial activity exception, they were also acts taken in connection with a commercial activity outside of the United States. When Dubai took over and provided for the management of the UBME, it engaged in a commercial activity in Dubai. Dubai engaged in

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[18] Galadari had pledged 6,068,640 shares of the UBME as security for the Note held by Drexel. Pls. Opp. Mot. Dis. at 5.

[19] Drexel's Note was not repaid, however, because when Drexel sought repayment from the Provisional Board, its chairperson refused repayment claiming that Drexel's Note represented "gambling losses" and were therefore unworthy of payment. Pls. Opp. Mot. Dis. at 7.

an act that could have been conducted by a private party -- in fact, which had previously been conducted by a private party, namely Galadari. Therefore, Dubai engaged in a commercial activity in Dubai, satisfying the second aspect of the requirements of the third clause of the commercial activity exception as to Dubai.

When the Committee marshalled, managed, and liquidated Galadari's assets, it engaged in commercial activities outside of the United States. The Committee engaged in activities that could have been conducted, previously, by a private party. For example, for a time, the Committee operated Galadari's hotel in Singapore. *See* Transcript of Argument on Motion to Dismiss ("Tr.") at 38. Therefore, the Committee engaged in commercial activities outside the United States, satisfying the second aspect of the requirements of the third clause of the commercial activity exception as to the Committee.

3. The Committee's Commercial Activity Had A Direct Effect In The United States

The final requirement of the third clause of the commercial activity exception is that the act in connection with commercial activity had a direct effect in the United States. *Weltover*, 119 L.Ed 2d 407.

The Court in *Weltover* dealt specifically with the issue of what constitutes a direct effect. The Court noted that the Second Circuit in that case had rejected the suggestion in the legislative history of the FSIA that a "direct effect" must be "substantial" and "foreseeable." *Weltover*, 119 L.Ed 2d at 407. The Court affirmed the lower court's interpretation, explicitly rejecting any suggestion that the direct effect requirement of the third clause of § 1605(a)(2) "contains any unexpressed requirement of 'substantiality' or 'foreseeability.'" *Weltover*, 119 L.Ed 2d at 407. The Court concluded that "an effect is 'direct' if it follows 'as an immediate consequence of the defendant's ... activity.'" *Weltover*, 119 L.Ed 2d at 407 (*quoting Weltover, Inc. v. Republic of Argentina*, 941 F.2d 145, 152 (2d Cir. 1991). In this context, the Court had "little difficulty" concluding that the rescheduling of the maturity dates of Argentine debt instruments had a "direct effect" in the United States.

Weltover, 119 L.Ed. 2d at 408. Specifically, the Court concluded that a "direct effect" in the United States exists where money is payable in the United States is not paid due to the commercial activity of a foreign state. *Weltover*, 119 L.Ed 2d at 408.

The actions of Dubai and the Committee had a "direct effect" in the United States. As in *Weltover*, the situs of the debt in this case is in the United States, specifically, New York. The Note held by Drexel was payable in the United States and by its terms is subject to the jurisdiction of this court. Pls. Opp. Mot. Dis. at 5. The acknowledgment of debts between Refco and Galadari and Drexel and Galadari were negotiated and executed in New York. Pls. Opp. Mot. Dis. at 5.

Part of the purpose of the commercial activity exception is to create equity between companies and foreign states that become involved in commercial activity. Where a company loans money to a foreign entity and takes precautions to have disputes adjudicated in the United States, then the FSIA will not immunize a foreign state that becomes involved in that commercial transaction from a fair adjudication. When Dubai and the Committee took over the control and management of Galadari's assets and refused to pay debts owed Drexel and Refco and payable in the United States, Dubai and the Committee produced a "direct effect" in the United States.

The commercial activity exception applies in this case. As required by the third clause of the commercial activity exception, Dubai and the Committee engaged in activities outside the United States in connection with commercial activity outside the United States that had a direct effect in the United States. Therefore, Dubai and the Committee have waived their immunity according to the commercial activity exception, and this court has subject matter jurisdiction.

III. PERSONAL JURISDICTION

Personal jurisdiction under the FSIa is a matter separate and apart from the issue of subject matter jurisdiction. *See Texas Trading*, 647 F.2d at 313 (issue of personal jurisdiction is

subsequent to determination of subject matter jurisdiction). *See also Walpex Trading v. Yacimientos Petroliferos*, 712 F.Supp. 383, 390 (S.D.N.Y. 1989) ("Personal jurisdiction over foreign sovereign instrumentalities under the FSIA involves a scrutiny distinct from ... subject matter jurisdiction"). Personal jurisdiction under the FSIA is statutorily defined as well as being governed by constitutional due process requirements. *See Walpex Trading*, 712 F.Supp. at 390 (Congress did not override constitutional due process requirements in drafting the FSIA).

In terms of what the statute requires, FSIA § 1330(b) states:

> Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) [providing for subject matter jurisdiction] where service has been made under section 1608.[20]

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[20] Subsection (a) of FSIA § 1330, regarding subject matter jurisdiction, is discussed above.

FSIA § 1608, regarding service, states:

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

> (1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or
>
> (2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or
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> (3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail

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[20](...continued)

requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned; or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services -- and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United State; or in accordance with an applicable international convention on service of judicial documents; or

(continued...)

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[20](...continued)

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state--

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be serve, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made--

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes [its] claim or

(continued...)

FSIA § 1330(b).

Thus, according to the statute, personal jurisdiction exist where there is both subject matter jurisdiction and service. *See Shapiro*, 930 F.2d at 1020 ("Under the FSIA, ... personal jurisdiction equals subject matter jurisdiction plus valid service of process."); *Texas Trading*, 647 F.2d at 313 (statute provides for "personal jurisdiction over the foreign state as to any claim the district court has power to hear under § 1330(a), so long as service has been made under § 1608.")

As discussed above, this court has subject matter jurisdiction over both Dubai and the Committee. There is no dispute concerning the validity of service. *See* Stipulation and Order, March 17, 1992, at ¶ 2; Emirate Mem. at 74 n.38. There being both subject matter jurisdiction and valid service, the statutory requirements for personal jurisdiction are satisfied.

In addition to statutory requirements, however, the constitutional due process requirements for personal jurisdiction must also be met. *See Shapiro*, 930 F.2d at 1020 (there exist constitutional constraints on personal jurisdiction under FSIA). The Constitution requires that there be sufficient "minimum contacts" between the foreign state and the forum "such that maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *See Shapiro*, 930 F.2d at 1020 (*citing International Shoe Co. v. Washington*, 326 U.S.

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[20](...continued)
right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

See also Bowers v. Transportes Navieros Ecuadorianos, 719 F.Supp. 166, 169 (S.D.N.Y. 1989) (discussing service requirements for personal jurisdiction).

310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945) quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).[21]

In this case, the constitutional requirements for personal jurisdiction were satisfied when the Committee voluntarily entered and participated in this litigation, thus waiving any subsequent claim to lack of personal jurisdiction. *Grammenos v. Lemos*, 457 F.2d 1067, 1070 (2d Cir. 1972) ("If a party enters a case, makes no objection to jurisdiction, and asks the court to act on its behalf in some substantive way, it will be held to have waived further objection [to jurisdiction].") (citations omitted).

Moreover, the Committee's general appearance and participation implicates Dubai. The Second Circuit in *Texas Trading* noted that it is not only defendant's activities in the forum, but also action relevant to the transaction by an agent on defendant's behalf, which support personal jurisdiction." *Texas Trading*, 647 F.2d at 314 (*citing Gelfand v. Tanner Motor Tours, Ltd.*, 385 F.2d 116, 120-21 (2d Cir. 1967), *cert. denied*, 390 U.S. 996, 88 S.Ct. 1198, 20 L.Ed.2d 95 (1968) (commercial activity of agent is chargeable to principle); *Frummer v. Hilton Hotels International, Inc.*, 19 N.Y.2d 533, 538, 281 N.Y.S.2d 41, 44-45. *But see Carey v. National Oil Corp.*, 592 F.2d 673 (2d Cir. 1979) (dismissing for lack of jurisdiction where minimum contacts did not exist, finding that the actions of principle do not apply to the agent).

Therefore, according to *Texas Trading*, the Committee's general appearance and contacts applies to Dubai, and Dubai can be said to have waived claims concerning lack of personal jurisdiction.

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[21] *See also Walpex Trading*, 712 F.Supp. at 390 (discussing requirements for specific and general jurisdiction and noting that "[u]nder the FSIA, contacts with the entire United States, as opposed to a particular state or forum, are relevant." *citing Verlinden*, 461 U.S. at 490). *See also Texas Trading*, 647 F.2d at 314 (regarding service under § 1608, entire United States is relevant in delineating contact).

In addition to the Committee's and Dubai's waiver of personal jurisdiction, both the Committee and Dubai have sufficient minimum contacts for due process, that is so that "maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Texas Trading*, 647 F.2d at 314 (*quoting International Shoe*, 326 U.S. at 316). In evaluating a defendant's minimum contacts,

> the court must examine the extent to which defendants availed themselves of the privileges of American law, the extent to which litigation in the United States would be foreseeable to them, the inconvenience to defendants of litigating in the United States, and the countervailing interest of the United States in hearing the suit.

Texas Trading, 647 F.2d at 314 (citations omitted).

Defendants in this case have sufficient minimum contacts for due process. The Committee as agent of Dubai voluntarily entered litigation in this court. Tr. at 81. The Committee requested affirmative relief, cost disbursements, and attorneys' fees. Tr. at 81. The Committee paid a judgment for costs on appeal that was entered by the Second Circuit. Tr. at 81. The Committee took discovery in this jurisdiction. Tr. at 81. And the debt at the heart of all of this litigation was negotiated and executed in the United States. In other words, defendants have had sufficient contact with the United States to satisfy due process.

Given the waiver by defendants of personal jurisdiction and given the minimum contacts of defendants, this court may constitutionally assume personal jurisdiction over both defendants.

Both the statutory and constitutional requirements being satisfied, this court has personal jurisdiction over both defendant Dubai and defendant the Committee.

IV. THE ACT OF STATE DOCTRINE DOES NOT BAR PLAINTIFFS' CLAIMS

Defendants also argue that plaintiffs' amended and supplemental complaint should be dismissed according to the Act of State Doctrine. The Act of State Doctrine states:

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

See Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 691 n. 7, 96 S.Ct. 1854, 48 L.Ed 2d 301 (1976) (*citing Underhill v. Hernandez*, 168 U.S. 250, 18 S.Ct. 83, 42 L.Ed 456 (1897)). The purpose of the Act of State Doctrine is to avoid the adjudication of actions that foreign states take on their own soil that might embarrass the Executive Branch or interfere with foreign policy. *See Dunhill* 48 L.Ed 2d at 313.[22]

In *Dunhill*, the Court considered the confiscation by the Cuban government of the businesses and assets of certain Cuban cigar manufacturers. The Cuban government named "interventors" [managing agents] to operate the seized businesses. When importers made payments for pre-intervention shipments to the interventors, the former owners brought suit in the United States. The Cuban interventors and the Republic of Cuba were permitted to join. The Court concluded that the Act of State Doctrine did not apply because the case involved acts which were commercial rather than public in nature. *Dunhill*, 48 L.Ed 2d at 313.

Both Dubai and the Committee were engaged in commercial activity, as determined above. Therefore, according to *Dunhill*,

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[22] Perhaps it should also be noted that the Act of State Doctrine is non-jurisdictional. *Friedar v. Government of Israel*, 614 F.Supp. 395, 399 (S.D.N.Y. 1985); *Dayton v. Czechoslovak Socialist Republic*, 672 F.Supp. 7, 11 (D.D.C. 1986). As a result, the application of the Act of State Doctrine is discretionary. *Friedar*, 614 F.Supp. at 399.

the Act of State Doctrine may not be raised to debar this court's adjudication.[23] Moreover, the Court in *Dunhill* noted that "[r]epudiation of a commercial debt cannot, consistent with this restrictive approach to sovereign immunity, be treated as an act of state." 48 L.Ed 2d at 314. The repudiation of the debts owed to Drexel and Refco in this case is therefore not an act of state.

In addition to the determination that defendants' acts were commercial, and therefore not acts of state, other details concerning defendants' transactions preclude the application of the Act of State Doctrine. The Second Circuit has determined that where the situs of the debt is in the United States, the Act of State Doctrine does not prevent creditors from recovering for their losses. *Allied Bank International v. Banco Credito Agricola de Cartoago*, 757 F.2d 516 (2d Cir. 1985), *cert. dismissed*, 87 L.Ed 2d 706 (1985).[24] The situs[25] of the

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[23] *But see Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 73 (2d Cir. 1977) (Expropriation of property of alien within boundaries of sovereign state are traditional public acts of sovereign, removed from judicial scrutiny by application of Act of State Doctrine).

In this case, however, Galadari, whose property was seized, is not an alien in Dubai. And while the nationalization of oil property in *Hunt* was accompanied by political statements suggesting reprisal against the United States as the motive and indicating that the nationalization was a public act, *Hunt*, 550 F.2d at 73, the seizure of Galadari's property was not accompanied by any such political statements. Non-public or commercial acts do not fall within the ambit of the Act of State Doctrine.

[24] *But see Braka v. Bancomer, S.N.C.*, 762 F.2d 222, 225 (2d Cir. 1985) (where situs of debt is wholly within foreign sovereign, Act of State Doctrine may bar recovery).

debts as to both Drexel and Refco in this case is the United States. The Note held by Drexel was payable in the United States. The acknowledgment of debt between Refco and Galadari was negotiated in New York. The Act of State Doctrine, therefore, does not govern this case or intimate its dismissal.

V. THE COMMITTEE'S ACTS EXTEND BEYOND ITS JUDICIAL OR QUASI-JUDICIAL ROLE

The Commitee asserts that it is immune from suit because of its "judicial or quasi-judicial" role. While the Committee has served in a quasi-judicial capacity, the Committee has also acted in commercial and non-judicial capacities. This court's jurisdiction in this matter is based upon the latter.

As discussed above, the Committee engaged in commercial activity that was neither judicial or quasi-judicial. That commercial activity having a direct effect in the United States subjects the Committee to this court's jurisdiction under the FSIA. Moreover, when the Committee appeared before this court and filed an extensive answer to plaintiffs' complaint, it was not acting in a judicial or quasi-judicial capacity. As discussed above, the Committee's general appearance and participation constituted an implicit waiver of immunity.

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[25](...continued)

[25] The test for "situs" in the context of the Act of State Doctrine is whether the purported taking was "able to come to complete fruition within the dominion of the [Dubai] government." *Allied*, 757 F.2d at 521 (*quoting Tabacalera Severiano Jore, S.A. v. Standard Cigar Co.*, 392 F.2d 706, 715-16 (5th Cir.), *cert. denied*, 393 U.S. 924, 89 S.Ct. 255, 21 L.Ed 2d 260 (1968).

Here, because defendants' acts involved debts payable to banks in the United States, they could not come to complete fruition within Dubai.

Defendant Committee cites authority for the proposition that members of the judiciary such as administrative law judges[26] and arbitrators[27] are immune from suit for actions they take in their judicial or quasi-judicial capacities. Defendant, however, cites no authority to support its claim that a foreign state or agent subject to the court's jurisdiction under the FSIA, that is, which has engaged in commercial activity or which has actively participated in litigation before the court, is immune from suit. Indeed, the FSIA explicitly states that where a party is subject to the court's jurisdiction under the FSIA, it is liable just as a private individual is liable.[28]

The Committee's judicial or quasi-judicial activities do not immunize it from suit, given the court's authority under the FSIA as to its commercial and non-judicial activities.

VI. PLAINTIFFS' CLAIMS ARE TIMELY

Defendants argue that plaintiffs claims are barred by the statute of limitations, asserting that plaintiffs' claims arose, if

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[26] *E.g., Butz v. Economou*, 438 U.S. 478 (1978), *on remand*, 466 F.Supp. 1351 (S.D.N.Y. 1979) (quasi-judicial function of administrative law judge entitled him to immunity).

[27] *E.g., Austern v. Chicago Bd. Options Exch. Inc.*, 898 F.2d 882, 886 (2d cir.), *cert. denied*, 111 S.Ct. 141 (1990) ("the Courts of Appeals ... have uniformly immunized arbitrators from civil liability for all acts performed in their arbitral capacity").

[28] FSIA § 1606 provides:

> As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances....

See also Verlinden, 461 U.S. at 488-89.

at all, in 1984.[29] Defendants' statute of limitations claim is unpersuasive and somewhat disingenuous. It is undisputed that plaintiffs' original claims against Galadari were timely. At that time, the Committee entered this litigation on Galadari's behalf and as an agent of Dubai. The Committee persuaded this court to stay its proceeding on comity grounds pending proceedings in Dubai. This court sustained the stay at the Committee's request for four years until this court determined that the proceedings in Dubai were unsatisfactory and undeserving of comity and lifted the stay.

Defendants cannot now argue, after delaying this case for four years in Dubai, that plaintiffs claims arising out of the same dispute is untimely. Plaintiffs' claims are not barred by any statute of limitations.

VII. PLAINTIFFS' MOTION FOR SECURITY

Plaintiffs have moved jointly to require defendants to post a bond as security for costs, attorneys' fees, any judgment that may be entered and any award of sanctions that may be levied against the Committee in this action. Drexel's motion for security for costs is granted. Refco's motion for security for costs including attorneys' fees is granted. Plaintiffs' motion for security covering judgment and sanctions is denied.

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[29] Defendants acknowledge that the FSIA sets no statute of limitations for suits against foreign states or their agents. Nevertheless, defendants contend that because foreign states are to be treated as any other private party, under § 1606, the statute of limitations that would apply to a private party should apply to Drexel and Refco in their suit against Dubai and the Committee. Defendants assert that it is an issue of first impression for the court to determine whether federal taking claims, state claims involving the expropriation of property, or conversion claims provide the best analogy. Defendants argue that plaintiffs time for suit has expired under any of the potentially applicable limitation periods.

Section 1606 of the FSIA states that a foreign state or instrumentality under the subject matter jurisdiction of the court is to be treated as any other private litigant. Under Local Rule 39 this court may require security for costs of a party to the litigation. Local Rule 39 states in pertinent part:

> The court, on motion or in [sic] its own initiatiative, may order any party to file an original bond for costs or additional security for costs in such an amount and so conditioned as it may designate.

The application of this Rule is not unprecedented.[30] Therefore plaintiffs' motion as to costs is granted.

While Rule 39 only specifies security for costs, security for attorneys' fees may be included in that award where the party seeking the security is otherwise entitled to attorneys' fees -- e.g. by statute or contract.[31]

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[30] *See Cresswell v. Prudential-Bache Securities, Inc.*, 1987 WL 4824 (S.D.N.Y. April 28, 1987) (awarding security for costs to defendant against Italian plaintiff prior to trial under Local Rule 39; "No question has been, or could be, raised with respect to the applicability of the Local Rule"); *Knight v. Yerkes and Associates, Inc.*, 675 F.Supp. 139, 142 (S.D.N.Y. 1987) (where plaintiff was resident of Thailand and collection of costs might be difficult, court granted security under Rule 39 covering depositions that would occur in various countries); *Tri-Ex Enterprises, Inc. v. Morgan Guaranty Trust Company of New York*, 1985 WL 144 (S.D.N.Y. January 11, 1985) (granting defendants' motion for costs under Local Rule 39).

[31] *See Herbstein v. Bruetman*, 141 F.R.D. 246, 247 (S.D.N.Y. 1992) ("The security for costs may include attorney's fees to which a party is potentially entitled"); *Beverly Hills Design Studio (N.Y.) Inc. v. Morris*, 126 F.R.D. 33, 36 (S.D.N.Y. 1989) ("While the language of Rule 39 limits itself to costs, attorneys' fees have been included in a cost bond where the defendant

(continued...)

Refco, in this case, is entitled to security for attorneys' fees because its contract with Galadari specifically states that Refco is entitled to attorneys' fees in the event of litigation concerning any collection action. Plaintiffs' Memorandum of Law in Support of Plaintiffs' Joint Motion for Security at 13.

Security covering potential judgment or sanctions is beyond the language and scope of Rule 39. Therefore plaintiffs' motion for security as to those awards is denied.

Drexel should submit affidavits outlining and detailing accrued and prospective costs. Refco should submit affidavits outlining and detailing same, including attorneys' fees.

VIII. CONCLUSION

For the foregoing reasons, the motions of the Emirate of Dubai and the Committee of Receivers to dismiss plaintiffs' amended and supplemental complaint is denied. Drexel's motion for security covering costs not including attorneys' fees is granted. Refco's motion for security covering costs, including attorneys' fees, is granted. Plaintiffs' motion for security covering potential judgment and sanctions is denied.

Submit Order on 15 days notice regarding costs.

Dated: January 14, 1993
New York, New York

/s/Constance Baker Motley
CONSTANCE BAKER MOTLEY
UNITED STATES DISTRICT
JUDGE

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[31](...continued)
was statutorily entitled to them"). *See also Verone v. Taconic Telephone Corp.*, 85 Civ. 8574, 1988 U.S. Dist. Lexis 1002 (S.D.N.Y. 1988) (dismissing case where plaintiff failed to post security for cost, attorneys' fees and possible sanction as ordered following an arbitration award against him).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

DREXEL BURNHAM, Plaintiff(s), - against - COMMITEE OF RECEIVERS, Defendant(s).

84 Civ. 2602 (CBM)
90 Civ. 2140 (CBM)

- x

PRE-TRIAL SCHEDULE AND ORDER

All parties having appeared for a Rule 16(b) Scheduling Conference on this day (with exceptions as noted below), it is hereby ORDERED as follows:

1. Joinder of other parties and amendemnts to pleadings must be completed by _____.

2. All substantive pre-trial motions must be served and filed on or before _____.

3. All discovery shall be concluded by all parties no later than May 1, 1993.

4. Each party's pre-trial memorandum and a joint pre-trial order must be submitted by June 1, 1993.

5. The next pre-trial conference shall be held in Room 906 on April 16, 1993 at 10:00 __.M., at which time all pending motions and all pre-trial discovery matters will be heard.

6. The trial will commence on June 14, 1993, preceding which there will be final pre-trial conference at 10:00 A.M. (The lawyers who will try the case *must* attend.)

7. It is further ORDERED as follows:

1) Motion to stay or quash discovery denied.

2) Motion to stay all proceedings denied.

3) Motion for bond costs pending appeal granted as to both Committee and Dubai.

ALL PARATIES ARE INSTRUCTED TO THOROUGHLY FAMILIARIZE THEMSELVES WITH THIS COURT'S "Memorandum to All Attorneys."

Copies are available in Chambers or will be supplied upon receipt of a stamped, self-addressed envelope.

Dated: New York, New York
January 22, 1993

SO ORDERED

/s/ Constance Baker Motley
CONSTANCE BAKER MOTLEY
Chief Judge

Supreme Court, U.S.
FILED
MAR 31 1994
OFFICE OF THE CLERK

Nos. 93-1361 and 93-1389

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

THE DREXEL BURNHAM LAMBERT GROUP INC. AND REFCO, INC.,
Petitioners,
v.
THE COMMITTEE OF RECEIVERS FOR A.W. GALADARI, and THE EMIRATE OF DUBAI, UNITED ARAB EMIRATES,
Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF IN OPPOSITION FOR RESPONDENT THE EMIRATE OF DUBAI, UNITED ARAB EMIRATES

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March 31, 1994

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Whether the commercial activities exception, 28 U.S.C. § 1605(a)(2), in the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602, *et seq.* (the "FSIA"), provides a basis for subject matter and personal jurisdiction in the courts of the United States with respect to claims asserted against a foreign state and its judicial and quasi-judicial agency, a Committee of Receivers created by a sovereign decree of the foreign state to conduct insolvency proceedings in the foreign state, where the act which forms the basis of the claims filed in the U.S. court is the quintessentially sovereign act of adjudicating claims filed in the foreign insolvency proceedings, and the sovereign act of adjudication bears, at best, an attenuated connection to unrelated commercial activities.

2. Whether the waiver exception in the FSIA, 28 U.S.C. § 1605(a)(1), permits a U.S. court to exercise subject matter and personal jurisdiction over a foreign state and its judicial and quasi-judicial agency or instrumentality, a Committee of Receivers created by a sovereign decree of the foreign state to conduct insolvency proceedings in the foreign state, where the Committee of Receivers participates in litigation in the United States only in a representative capacity on behalf of the insolvent estates of private entities, and asserted the defense of sovereign immunity in response to each and every attempt to assert a claim against the Committee of Receivers itself, and never expressly waived its immunity or evidenced a conscious decision to waive its immunity with respect to claims asserted against it.

PARTIES TO THE PROCEEDINGS

Respondents are the Emirate of Dubai, United Arab Emirates (the "Emirate") and the Committee of Receivers for A.W. Galadari, *et al.* (the "Committee"). The Emirate is a sovereign government which is a member of the United Arab Emirates and as such is a foreign state under the FSIA. The Committee is a judicial and quasi-judicial agency created by a sovereign decree of the Emirate to, *inter alia*, conduct insolvency proceedings in Dubai for the insolvent estates of A.W. Galadari ("Galadari") and his businesses, including A.W. Galadari Commodities ("Commodities") and A.W. Galadari Holdings (Private) Ltd. ("Holdings"). The Committee is also entitled to sovereign immunity under the FSIA.

Petitioners The Drexel Burnham Lambert Group Inc. ("Drexel") and Refco, Inc. ("Refco") were plaintiffs in two cases which were consolidated, both on appeal in the Court of Appeals for the Second Circuit (the "Court of Appeals") and in the United States District Court for the Southern District of New York (the "District Court"). Defendants Galadari, Commodities and Holdings were not parties to the appeal to the Court of Appeals and are not parties in this Court.

Petitioners Drexel and Refco first named the Emirate and the Committee as defendants in the Supplemental and Amended Complaints (the "Supplemental Complaints") filed in 1992. The Court of Appeals dismissed the Supplemental Complaints against the Emirate and the Committee on the grounds of foreign sovereign immunity.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

Nos. 93-1361 and 93-1389

THE DREXEL BURNHAM LAMBERT GROUP INC. AND REFCO, INC.,

Petitioners,

v.

THE COMMITTEE OF RECEIVERS FOR A.W. GALADARI, and THE EMIRATE OF DUBAI, UNITED ARAB EMIRATES,

Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF IN OPPOSITION FOR RESPONDENT THE EMIRATE OF DUBAI, UNITED ARAB EMIRATES

Respondent Emirate respectfully requests that this Court deny the separate petitions of Drexel and Refco (hereinafter collectively referred to as "Petitioners") for a writ of certiorari seeking review of the decision of the Court of Appeals in this case (the "Court of Appeals Decision").

JURISDICTION

Jurisdiction in this Court is based upon 28 U.S.C. § 1254(1). However, it is the contention of Respondent Emirate that the courts of the United States lack subject matter and personal jurisdiction over it because the Emirate is a foreign state entitled to sovereign immunity

under the FSIA. The FSIA is the exclusive basis for personal and subject matter jurisdiction in actions against foreign states. *Saudi Arabia v. Nelson*, —— U.S. ——, 113 S. Ct. 1471, 1476 (1993).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reprinted in Refco's petition ("Refco Pet.") at 2-3 and in Drexel's petition ("Drexel Pet.") at 2-3. Additional statutory provisions that are involved are set forth in the Appendix hereto ("EA") at 1a-3a.

COUNTER STATEMENT OF THE CASE

The Emirate submits this counter statement of facts to correct misstatements and distortions contained in the petitions filed by Drexel and Refco.

The *Drexel* and *Refco* actions involve an attempt by Petitioners to shift liability for private debts for commodities trading losses owed to Petitioners by the insolvent estates of Galadari and Commodities to Respondents Emirate, a foreign state, and the Committee, a separate juridical entity which is an independent, judicial and quasi-judicial agency or instrumentality of the Emirate. The Committee was created by Emirate Decree No. 3 of 1984 (the "1984 Decree") to conduct insolvency proceedings in Dubai with respect to the insolvent estates of Galadari, Commodities and other Galadari entities (hereinafter the "Dubai insolvency proceedings"). EA 4a-13a.

Contrary to Petitioners' assertions [1], neither the *Drexel* nor the *Refco* case involves the repudiation of debts by either the Committee or the Emirate, neither of which was obligated in any way to Petitioners for the debts of Galadari or Commodities. Rather, as found by the Court of Appeals, the gravamen of Petitioners' claims against the Committee (and the Emirate as the alleged "alter

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[1] *E.g.*, Drexel Pet. at 19; Refco Pet. at 9, 15.

ego" of the Committee) is the Committee's adjudication, in April 1991, of claims filed by Drexel and Refco in the Galadari insolvency proceedings. *See* Appendices to Drexel's and Refco's petitions (hereinafter "PA"), 25a.[2] Petitioners' claims against Galadari and Commodities were *allowed* by the Committee, but remain unpaid because those insolvent estates lack sufficient funds to pay the claims.

Therefore, the core of the dispute is (1) the Committee's adjudication which denied Petitioners' claims that another Galadari entity, Holdings, was responsible for the debts of Commodities, and (2) additionally, in Drexel's case, the Committee's denial of Drexel's claim that it had a valid security interest in certain shares of the Union Bank of the Middle East (the "UBME"), which were purportedly pledged to Drexel by Galadari. Thus, the "acts" upon which this litigation is based are *sovereign acts, i.e.* the adjudication by the Committee, a quasi-judicial agency of the Emirate, of claims filed in the Galadari insolvency proceedings in Dubai, which adjudication was undertaken pursuant to authority granted by sovereign decree.

Nor is this a case in which the Committee or the Emirate waived its immunity under the FSIA. The Emirate had *no* involvement in either lawsuit until it was added as a defendant *in 1992* and then it immediately moved to dismiss on the grounds of sovereign immunity under the FSIA. The Committee's involvement in the Drexel and Refco litigation was as the *representative* of the insolvency estates of non-immune defendants Galadari and Commodities. Each time a claim was asserted against the Committee *qua* Committee, it duly asserted sovereign immunity. This was confirmed by the Court of Appeals which, applying the well-recognized legal standard that implied waivers are to be "narrowly construed", held that

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[2] The page numbers of the Court of Appeals decision in the Appendices to both petitions are identical.

there was no waiver of immunity by the Committee (and thus no waiver by the Emirate, the Committee's alleged "alter ego"). PA 15a-21a.

The Drexel and Refco Lawsuits Prior to the Filing in 1992 of the Supplemental Complaints.

Drexel and Refco initiated their lawsuits in New York in 1984 as simple actions to collect on contractual obligations owed to them by Galadari and Commodities.[3] Neither the Emirate nor the Committee was involved in the creation of the obligations of Galadari or Commodities, nor were they named as defendants in the original complaints filed in 1984. PA 5a, 7a.

Galadari had operated a vast business and financial empire centered in Dubai, including construction, financial services, hotels and other businesses. By late 1983, Galadari and the various companies he controlled were insolvent. In order to forestall financial catastrophe in Dubai and the surrounding region, the Emirate undertook a series of sovereign acts. *Drexel Burnham Lambert Group Inc. v. Galadari*, No. 84 Civ. 2602, 1987 U.S. Dist. LEXIS 5030 (S.D.N.Y. Jan. 29, 1987) ("*Drexel IV*"), at 3-7.[4] In November 1983, by Decree No. 5 of 1983, the Emirate created a Provisional Board of Directors to take charge of the operations of the UBME, a Galadari-controlled bank chartered in Dubai which was on the

[3] Drexel commenced its action in the United States District Court for the Southern District of New York against Galadari and Commodities for breach of their written obligations to repay commodities trading losses. Damages in the amount of $12.6 million, plus interest, were sought. Refco commenced its action against Galadari and Commodities in New York State Court, in 1984, seeking damages for breach of written obligations to repay commodities trading losses in the range of $4.5 million, plus interest. PA 5a, 7a.

[4] *Drexel IV* contains the District Court's 1987 findings of facts and conclusions of law, which detail the factual background to the Galadari insolvency and the creation of the Committee pursuant to the 1984 Decree.

brink of failure. The Provisional Board for a short time was given control of Galadari's banking and non-banking assets. When a moratorium on the payment of the debts of Galadari and his companies failed because of the prosecution of individual actions by creditors, the Emirate, which lacked any bankruptcy code and dealt with bankruptcies on an *ad hoc* basis, issued the 1984 Decree which created an orderly insolvency procedure whereby the Committee would marshal the assets of Galadari and his companies and adjudicate claims (subject to review in a special court created for that purpose). PA 4a. The Emirate also paid over to the Committee far more than fair value for the approximately 80% of the UBME shares which it unilaterally acquired.[5] The Committee, in turn, paid compensation for the UBME shares to those persons filing claims who could prove their entitlement thereto. Also, pursuant to the 1984 Decree, all cases pending in the Dubai courts against Galadari and his companies were stayed and those claims were required to be filed with the Committee. EA 11a.

Both New York lawsuits against Galadari and Commodities came to a halt following the institution of the Galadari insolvency proceedings. The Committee, in *its capacity as representative* of and on behalf of the insolvency estates of Galadari and Commodities, moved to stay or dismiss the Drexel action in 1984 on the grounds of comity so that Drexel would file its claim against Galadari and Commodities in the Dubai insolvency proceedings.[6] *Drexel Burnham Lambert Group Inc. v. Galadari*, 610 F. Supp. 114 (S.D.N.Y.), *aff'd in part and vacated in part*, 777 F.2d 877 (2d Cir. 1985). The District Court initially dismissed the Drexel action. On

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[5] *See* note 23, *infra*.

[6] There was no claim asserted against the Committee at that time and thus no basis for the Committee to assert sovereign immunity. The only claims made were on the private debts of Galadari and Commodities, both non-immune defendants.

appeal, the Second Circuit Court of Appeals vacated the dismissal and remanded the case for factual findings. On remand, the District Court made detailed findings of fact and entered a stay in 1987 on the grounds of comity on the basis that "the Galadari Bankruptcy Decree and proceedings [in Dubai] are consonant with our notions of fairness and due process". *Drexel IV* at 28.

In the *Refco* action, the Committee, *also in its capacity as representative of the estates of Galadari and Commodities*, opposed a motion for attachment of Galadari assets located in New York City. PA 7a. When the New York State Court, *sua sponte*, added the Committee as an additional defendant, the Committee immediately filed a motion to dismiss on the grounds of sovereign immunity. The motion was later withdrawn without prejudice, as the parties agreed to a series of adjournments of the New York State Court action in order that Refco would file and pursue its claims in the Dubai insolvency proceedings.[7] *See Refco, Inc. v. Galadari*, 755 F. Supp. 79, 80 (S.D.N.Y. 1991).

With the New York lawsuits at a standstill, both Drexel and Refco filed proofs of claim in the Dubai insolvency proceedings. Those proofs of claim included the contractual claims against Galadari and Commodities, and an additional claim against Holdings asserting that Commodities was a division of Holdings and that Holdings, which had no contractual relationship with Petitioners, was therefore responsible for the debts of Commodities. This was significant because the insolvent estate of Holdings contained sufficient assets to pay in excess of 80% of Petitioners' claims if allowed against Holdings, while the Galadari and Commodities estates had insufficient assets to satisfy allowed claims. No claim against Holdings had previously been raised in the New York litigation.

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[7] When the Committee later filed its answer, it included sovereign immunity as a defense. PA 8a.

Both Refco and Drexel prosecuted their claims in the Dubai insolvency proceedings. Hearings were held and submissions were made to the Committee. When no decision had been made on its claims in the Dubai insolvency proceedings by 1990, Refco refused to give a further adjournment in the New York State Court action. At that point, the Committee removed the New York State Court action to the District Court pursuant to 28 U.S.C. § 1441(d). *Refco*, 755 F. Supp. at 81. The District Court then consolidated the *Refco* and *Drexel* actions and extended its stay of the *Drexel* action to the *Refco* action. *Id.* at 84. However, by early 1991, when there had been no decision on Drexel's and Refco's claims in the Dubai insolvency proceedings, both moved to lift the stay so that they could pursue their claims in the District Court. The District Court initially ruled that unless the Committee rendered a decision by April 16, 1991, it would lift the stay.[8]

In April 1991, the Committee issued a comprehensive decision on the claims of Drexel and Refco in the Dubai insolvency proceedings. The Committee *allowed* Drexel's and Refco's claims against Galadari and Commodities, but disallowed the claims against Holdings on the basis, *inter alia*, that it was not responsible for the debts of Galadari or Commodities. In addition, the Committee disallowed Drexel's claim that Galadari's obligation to it was secured by 6,068,640 UBME shares allegedly pledged to it by Galadari.[9]

In June 1991, the District Court lifted the stay on the grounds that the Dubai insolvency proceedings were no

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[8] *Drexel Burnham Lambert Group Inc. v. Galadari*, 127 B.R. 87, 107 (S.D.N.Y. 1991); *Drexel Burnham Lambert Group Inc. v. Galadari*, 134 B.R. 719, 728 (S.D.N.Y. 1991).

[9] This result had been foreseen to a large degree by the District Court in its 1987 findings of fact and conclusions of law entered at the time the *Drexel* action was stayed. *Drexel IV* at 25-27, findings of fact nos. 41-51. *See also infra* note 23.

longer entitled to comity recognition because the Committee did not conduct those proceedings in conformity with U.S. notions of fairness. PA 9a. Thus, Petitioners were free to pursue their claims against Galadari and Commodities in the District Court.

In early 1992, recognizing that Galadari and Commodities had insufficient assets to satisfy their claims and in search of a deep pocket,[10] Drexel and Refco amended their complaints to add the Emirate and the Committee as defendants and to assert entirely new claims against them. The Supplemental Complaints focused primarily on the Committee's activities, especially in reviewing and adjudicating the claims of Drexel and Refco in 1991. In May 1992, the Emirate was served with the Supplemental Complaints making it a party for the first time.

The Supplemental Complaint in the Drexel Action.

The Drexel Supplemental Complaint asserts one claim against Galadari and Commodities for breach of a written contract and four claims against the Emirate and the Committee. As the Court of Appeals found, all the claims asserted against the Emirate were based on the Committee's adjudication of Petitioners' claims in the Dubai insolvency proceeding. PA 24a-25a. Drexel sought to attribute these acts to the Emirate on an agent-principal or "alter ego" theory.[11]

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[10] In an affidavit submitted in support of its motion to amend the complaint, counsel for Drexel admitted that the Emirate was being joined as a defendant because it believed that the Emirate had sufficient assets in the United States to pay Drexel's claims.

[11] The only claim asserted against the Emirate directly in either Supplemental Complaint was Drexel's Third Claim for a purported taking of its alleged security interest in certain UBME shares as a result of the Emirate's unilateral acquisition of approximately 80% of the outstanding UBME shares in 1983. Drexel's position in the courts below was that this claim did not come to fruition until the Committee, acting in April 1991 in the Dubai insolvency proceedings, denied Drexel's claim for the proceeds of those shares

The Supplemental Complaint in the Refco Action.

The Refco Supplemental Complaint contains two claims against Galadari and Commodities for failure to repay their commodities trading debts, one claim against Holdings on the grounds that it is liable for the debts of Commodities, and three claims against the Committee and the Emirate (based on the acts of its alleged agent or alter ego, the Committee). Here again the Committee's acts in adjudicating Refco's claims in the Galadari insolvency proceedings were the essence of Refco's claims against the Committee and the Emirate. PA 24a-25a.

On August 24, 1992, the Emirate moved to dismiss both Supplemental Complaints on the grounds, *inter alia*, that the District Court lacked subject matter and personal jurisdiction under the FSIA because the Emirate is a "foreign state" within the meaning of the FSIA and because the acts complained of were public, governmental acts, and not within any of the FSIA exceptions to immunity. The Committee, as an "agency or instrumentality" of a foreign state, had also filed a motion to dismiss for lack of subject matter and personal jurisdiction.[12]

The record before the District Court on the motions to dismiss included the Supplemental Complaints, extensive

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paid to the Committee by the Emirate for distribution to UBME shareholders who could prove their entitlement. Thus, *all* the claims made by Drexel and Refco against the Emirate are based on alleged acts of the Committee undertaken in the course of the Dubai insolvency proceedings.

[12] Both motions were consolidated for hearing and determination in the District Court. The Committee, as representative of the estates of Galadari and Commodities, filed answers on behalf of Galadari and Commodities. Neither the Committee nor the Emirate has ever filed a responsive pleading to the claims asserted against them in the Supplemental Complaints. Rather, both immediately moved to dismiss the Supplemental Complaints, *inter alia*, for lack of subject matter jurisdiction under the FSIA.

findings of fact made by the District Court in 1987 at the time it stayed the *Drexel* action and the record developed in 1991 after lengthy hearings on Refco's motion to lift the stay. The record also included declarations, sworn under penalty of perjury, from the Legal Advisor to the Ruler of Dubai concerning the creation and independence of the Committee, the relevant Emirate decrees, the Committee's thirty-three page decision adjudicating Petitioners' claims, various excerpts from minutes of Committee meetings, Declarations from members of the Committee, and other documents which detailed the background to the Committee's decision on Petitioners' claims in the Galadari insolvency proceedings in Dubai.

The District Court denied both the Emirate's and the Committee's motions to dismiss in its January 14, 1993, order. PA 12a. The District Court based jurisdiction on the exceptions to immunity set forth in 28 U.S.C. § 1605 (a)(1) (the waiver exception) and § 1605(a)(2) (the commercial activities exception). The District Court also found the Emirate responsible for the Committee's acts as the Committee's "alter ego" without making any findings of fact, thereby ignoring the long-recognized presumption of independence between a foreign state and its agency or instrumentality. *See First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 627-28 (1983) ("*Bancec*").

Thereafter, the Emirate and the Committee each filed timely appeals to the Court of Appeals under the collateral order doctrine which permits immediate appeal from orders denying motions to dismiss for lack of subject matter jurisdiction under the FSIA.

On November 29, 1993, the Court of Appeals, having reviewed the matter *de novo*, reversed the District Court and dismissed the Supplemental Complaints filed against both the Emirate and the Committee on the grounds that the District Court lacked subject matter and personal

jurisdiction under the FSIA. PA 1a-30a. The Court of Appeals, consistent with every Circuit Court of Appeals that has dealt with the issue, held that the implied waiver provisions of the FSIA must be "construed narrowly", and that there was no "unmistakable" and "unambiguous" waiver of FSIA immunity by the Committee (and none therefore by the Emirate as the purported "alter ego" of the Committee). PA 15a-21a. The Court of Appeals also held that the third clause of the commercial activities exception found in § 1605(a)(2) did not apply because Petitioners' claims were based on sovereign, immune acts:

> The "acts" upon which the claims of Drexel and Refco are "based" are essentially the adverse determination of their claims by the Committee, including the determination that Galadari had not effectively pledged [UBME] shares to Drexel as security for payment of the Note. . . .
>
> Neither the resolution of creditors' claims against the Galadari estate nor the determination of which [UBME] creditors held valid security interest in that bank constituted activity that could have been performed by private parties. Accordingly, § 1605 (a)(2) does not strip the Committee and the Emirate of FSIA immunity in this action.

PA 25a-27a.

REASONS WHY THE PETITIONS FOR CERTIORARI SHOULD BE DENIED

Nothing in Petitioners' applications to this Court establishes any special and important reasons for granting a petition for a writ of certiorari.

I. THE PETITIONS SHOULD BE DENIED BECAUSE THE COURT OF APPEALS DECISION WITH RESPECT TO THE "COMMERCIAL ACTIVITIES" EXCEPTION DOES NOT RAISE ANY SPECIAL OR IMPORTANT REASONS FOR REVIEW.

A. The Court of Appeals Correctly Applied This Court's Recent Decisions in *Saudi Arabia v. Nelson* and *Argentina v. Weltover, Inc.*

Certiorari should be denied because there is no need for this Court to revisit the commercial activities exception, 28 U.S.C. § 1605(a)(2), as this Court has issued two opinions in the last two years construing that exception. *Nelson, supra*; *Republic of Argentina v. Weltover, Inc.*, —— U.S. ——, 112 S. Ct. 2160, 2165 (1992).[13] Moreover, the Court of Appeals Decision is entirely consistent with both of these decisions.

As explained in *Nelson* and *Weltover*, the FSIA codifies the restrictive theory of foreign sovereign immunity under which "a state is immune from the jurisdiction of foreign courts as to its sovereign or public acts (jure imperii), but not as to those that are private or commercial in character (jure gestionis)." *Nelson*, 113 S. Ct. at 1478-79; *Weltover*, 112 S. Ct. at 2165. Thus, a foreign state "engages in commercial activity for purposes of the restrictive theory only where it acts 'in the manner of a private player within' the market." *Nelson*, 113 S. Ct. at 1479 (quoting *Weltover*, 112 S. Ct. at 2166). Furthermore, the FSIA unmistakably commands that the

[13] It is important to note that the District Court rendered its decision prior to this Court's decision in *Nelson, supra*, which clarified the "commercial activities" exception.

commercial character of activity must be determined by reference to its "nature" (*i.e.*, the outward form of the conduct that the foreign state performs), rather than its "purpose" (*i.e.*, the reason why the foreign state engages in the activity). 28 U.S.C. § 1603(d); *Nelson*, 113 S.Ct. at 1479.

Applying these principles, the Court of Appeals utilized a "gravamen" test, which focuses on "those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." *Nelson*, 113 S. Ct. at 1477.[14] The Court of Appeals found that the gravamen of Petitioners' claims was "the essentially judicial role of the Committee in marshalling the assets of Galadari and Commodities and adjudicating the claims of their creditors," including those of Petitioners. PA 24a-25a. Petitioners seek to shift the focus away from the judicial (sovereign) acts on which their claims are based to unrelated activity (the interim operation of certain Galadari businesses pending their liquidation) which had nothing to do with establishing the elements of the claims asserted by them.

The Court of Appeals also followed the *Nelson* and *Weltover* instruction that a sovereign engages in commercial activity when it engages in activities that could have been conducted by private parties. The Court of Appeals found that "[n]either the resolution of creditors' claims against the Galadari estate nor the determination of which [UBME] creditors held valid security interest in that bank constituted activity that could have been performed by private parties." PA 26a. Thus, the relevant "acts" upon which Petitioners' claims are based were found to be sovereign and not commercial.

Finally, Petitioners' analysis of *Weltover* is wrong. Thus, their assertion that in *Weltover*, a decision under

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[14] In *Nelson*, this Court referred to opinions of the courts of appeals which had applied the gravamen test. *Nelson*, 113 S. Ct. at 1477.

the third clause of § 1605(a)(2), "jurisdiction existed over the government of Argentina where Argentina's *sovereign* act of rescheduling certain debts was undertaken in connection with commercial activity", Refco Pet. at 15 (emphasis added), Drexel Pet. at 18-19, contradicts this Court's holding in *Weltover* that Argentina was engaged in commercial, not sovereign, activity. Moreover, Petitioners' assertion flatly contradicts this Court's language in *Nelson*, where, in describing its holding in *Weltover*, this Court stated "just last term in *Weltover, supra*, which involved Argentina's unilateral refinancing of bonds it had issued under a plan to stabilize its currency . . . [we held] the refinancing to be a commercial activity for purposes of the [FSIA]." *Nelson*, 113 S. Ct. at 1478. Thus, the "act" upon which the claim in *Weltover* was based was the breach of a commercial contract by the government of Argentina.

B. The Court of Appeals Correctly Construed the Third Clause of the Commercial Activities Exception.

Petitioners' contention that the Court of Appeals misapplied the third clause of the commercial activities exception, which applies when "*the action* is *based . . . upon an act* outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that *act* causes a direct effect in the United States", is incorrect. 28 U.S.C. § 1605(a)(2) (emphasis added). Petitioners' construction of the third clause would extend it to include claims based on sovereign acts, *i.e.*, the adjudication of claims by a judicial and quasijudicial agency of a foreign state, by attempting to relate those sovereign acts to purported commercial activity which has only an attenuated and tangential connection at best. This construction of the third clause of the commercial activities exception is unwarranted and contradicts the restrictive theory of sovereign immunity codified in the commercial activities exception.

The Court of Appeals correctly applied the third clause of the commercial activities exception by finding that the "acts" upon which Petitioners' claims were "based" were the Committee's adverse determination of their claims in the Galadari insolvency proceedings, which was sovereign activity. PA 24a-25a. It then dismissed Petitioners' assertion that these sovereign acts could be linked to "tangentially related commercial conduct in which the Committee or the Emirate *might* have engaged", PA 25a (emphasis added), in a sufficient manner to find a basis for jurisdiction within the commercial activities exception.[15] Thus, the Court of Appeals found that the tangential commercial activities to which Petitioners sought to relate the sovereign acts had such an attenuated connection with those sovereign acts that the exercise of jurisdiction was precluded. Furthermore, if it had held otherwise, the commercial activities exception "would effectively be rewritten to authorize the exercise of jurisdiction over acts that are essentially sovereign in nature." *Id.*

Contrary to Petitioners' assertions, the Court of Appeals did not hold that the *acts* upon which a third clause claim is based must be solely "commercial activity" or a "commercial act." Refco Pet. at 11; Drexel Pet. at 17. The Court of Appeals merely held, that the "act" upon which Petitioners' claims were based was sovereign, *i.e.* the adjudication of claims by the Committee in Dubai, and that the claims were not based on other activities which Petitioners had described below as "commercial activity." PA 24a-25a.

Nor did the Court of Appeals hold, as Petitioners contend, that the "commercial activity" referred to in the third clause of § 1605(a)(2) must cause "a direct effect" in the United States. Refco Pet. at 11; Drexel Pet. at 17.

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[15] The Court of Appeals also stated that describing the tangential activity relied upon by Petitioners as "commercial" was "suspect". PA 24a, n.3.

Here, again, the Court of Appeals properly construed the third clause of § 1605(a)(2) by requiring that the *act* outside the territory of the United States, upon which the action was based, be the same *act* that caused a direct effect in the United States. In the Court of Appeals analysis that *act* was the adjudication of Petitioners' claims by the Committee in the Dubai insolvency proceedings. By contrast, Petitioners' contention rests on their argument, rejected by the Court of Appeals, that other activities described by them as "commercial" constituted the "act" upon which their claims were based. PA 24a-25a. Thus, the Court of Appeals' construction of the statute was consistent with the statutory language and with the decisions of this Court in *Weltover* and *Nelson*.

C. There Is No Conflict Among the Circuit Courts of Appeals.

The cases relied upon by Petitioners do not demonstrate a conflict among the Circuits. Indeed there is none. *See, e.g., Millen Indus., Inc. v. Coordination Council for N. Am. Affairs*, 855 F.2d 879, 885 (D.C. Cir. 1988); *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 450 (D.C. Cir. 1990); *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371, 1379 (5th Cir. 1980).

Petitioners mislead the Court when they state that *Federal Ins. Co. v. Richard I. Rubin & Co., Inc.*, 12 F.3d 1270, 1291 (3rd Cir. 1993), "*held* that the 'third clause[] of the FSIA commercial activity section use[s] the 'in connection with' language, which arguably might allow for a more tenuous causal link between the claims alleged and the commercial activities [of the foreign sovereign]' ". Refco Pet. at 18 (emphasis added); Drexel Pet. at 20. In actuality, the Third Circuit held in *Federal Ins.* that jurisdiction did not exist under the third clause of the commercial activities exception because "the causes of action alleged in the lawsuit are not *substantively con-*

nected to the loan transaction." *Federal Ins.*, 12 F.3d at 1291 (emphasis added). This is similar to the analysis of the Court of Appeals below. PA 23a-26a.

Similarly, in *Stena Rederi A.B. v. Petroleos Mexicanos*, 923 F.2d 380, 388 (5th Cir. 1991), an analogous [16] "second clause" case, the Fifth Circuit held that a "material connection must exist between the act upon which the claim is based and the commercial activity to which it relates. In *Vermeulen v. Renault, U.S.A., Inc.*, 985 F.2d 1534 (11th Cir. 1993), the Eleventh Circuit specifically held that "in designing and manufacturing cars for sale, RNUR [the foreign government-owned defendant] acted *not in any governmental capacity*, 'but in the manner of a private player', no different from General Motors, Ford, or any privately held automobile manufacturer." *Id.* at 1544 (emphasis added). *Vermuelen* clearly does not authorize jurisdiction over sovereign acts when the sovereign engages in tangential commercial activity.

In *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 709 (9th Cir. 1992), *cert. denied*, —— U.S. ——, 113 S. Ct. 1812 (1993), the Ninth Circuit also noted that a "material connection" must exist between the plaintiff's cause of action and the act performed in the United States in analogous second clause cases. The Ninth Circuit did not reach a conclusion as to the applicability of the third clause exception but only remanded for further factual development on that issue. *Id.* at 711. *Siderman* in no way authorizes jurisdiction on the basis of tangential commercial activity.

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[16] The second and third clauses of the commercial activities exception contain similar "in connection with" language.

III. THE PETITIONS SHOULD BE DENIED BECAUSE THERE IS NO SPECIAL OR IMPORTANT REASON FOR GRANTING CERTIORARI WITH RESPECT TO THE WAIVER ISSUE.

A. There Is No Conflict Among the Circuit Courts of Appeals as to the Legal Standard to Be Applied.

All the courts of appeals that have considered the matter are in complete agreement that the implied waiver provisions of 28 U.S.C. § 1605(a)(1) must be "narrowly construed", and that an implied waiver must be "unmistakable" and "unambiguous" and requires, at a minimum, a conscious decision to participate in litigation and waive immunity. *Shapiro v. Republic of Bolivia*, 930 F.2d 1013, 1017 (2d Cir. 1991) ("Federal courts have been virtually unanimous in holding that the implied waiver provision of Section 1605(a)(1) must be construed narrowly"); *Foremost-McKesson*, 905 F.2d at 444 (waiver requires a conscious decision to take part in litigation and thereby waive immunity); *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 377 (7th Cir. 1985) (waiver exception narrowly construed); *Joseph v. Office of the Consulate General of Nigeria*, 830 F.2d 1018, 1022 (9th Cir. 1987) (waiver exception "narrowly construed"), *cert. denied*, 485 U.S. 905 (1988); *Siderman*, 965 F.2d at 720 ("narrowly construed"). *See also Canadian Overseas Ores Ltd. v. Compania de Acero del Pacifico S.A.*, 727 F.2d 274, 277 (2d Cir. 1984) (filing various motions, including motions to dismiss and to stay proceedings pending outcome of litigation in Chile, as opposed to responsive pleadings, did not waive sovereign immunity). Thus, there is no conflict among the Circuits as to the applicable law on implied waivers of sovereign immunity under the FSIA.

B. The Court of Appeals Correctly Construed the Implied Waiver Language of § 1605(a)(1) and Correctly Applied the Well-Recognized Legal Standard to Undisputed Facts.

The case law applying the legislative history emphasizes that an implied waiver by a party through the filing of a responsive pleading requires "a conscious decision to take a part in litigation and a failure to raise sovereign immunity despite the opportunity to do so." *Shapiro*, 930 F.2d at 1017; *Foremost-McKesson*, 905 F.2d at 443-44; *Frolova*, 761 F.2d at 378.

The Court of Appeals Decision [17] relied on this unified and substantial body of law in concluding that the record did not reveal an "unmistakable" or "unambiguous" implied waiver by the Committee of its sovereign immunity. PA 15a-21a.[18] The Court of Appeals emphasized

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[17] It should be noted that the dissent in the Court of Appeals did not express any disagreement with the majority's analysis of the waiver issue.

[18] Petitioners' grandiose assertion that the Court of Appeals Decision on waiver "is at odds with every Federal decision on this issue" is wholly unsubstantiated. *See* Drexel Pet. at 11-12. None of the cases upon which Petitioners seek to rely support the proposition that a foreign state specifically appearing in a limited, representative capacity on behalf of non-immune defendants waives its own immunity with respect to unasserted future claims which do not even exist at that time. For example, in *Siderman*, a case upon which Petitioners seek to rely, the Ninth Circuit expressly noted that "the only material before [it] on the issue of waiver is that presented by the Sidermans", and that, in light of the allegations that Argentina had deliberately implicated U.S. courts in its persecution of the plaintiffs, there was a sufficient basis to remand the case to the district court for further proceedings on the waiver issue. *Siderman*, 965 F.2d at 720.

Similarly, Petitioners' reliance on *Corporacion Venezolana de Fomento v. Vintero Sales Corp.*, 477 F. Supp. 615 (S.D.N.Y. 1979), *rev'd on other grounds*, 620 F.2d 786 (2d Cir. 1980), *cert. denied*, 469 U.S. 1087 (1984), and *Sea Lift, Inc. v. Refinadora Costarricense de Petroleo, S.A.*, 601 F. Supp. 457 (S.D. Fla. 1984), *rev'd on other grounds*, 792 F.2d 989 (11th Cir. 1986), is also misplaced. In

that the Committee's participation in the proceedings merely as the representative of the insolvency estates of two non-immune defendants simply could not constitute a conscious decision to waive its own defense to sovereign immunity as to future claims. Moreover, the Court of Appeals Decision properly concluded that "[h]owever its participation is regarded, the Committee consistently invoked FSIA immunity, or reserved the right to do so in the future, to an extent that precludes a determination that FSIA immunity was unambiguously and unmistakably waived." PA 21a.[19]

Thus, the implied waiver language of § 1605(a)(1) was correctly interpreted and applied by the Court of Appeals and there is no special reason for this Court's exercise of its certiorari discretion.

III. THE PETITIONS SHOULD BE DENIED BECAUSE THE COURT OF APPEALS DECISION CAN BE SUSTAINED ON OTHER ALTERNATIVE GROUNDS.

There are several additional grounds which were not reached by the Court of Appeals, which support the dismissal of the Supplemental Complaints against the Emirate. These include the Act of State Doctrine and the doctrine of Judicial Immunity. Furthermore, although the Court of Appeals did not need to reach the issue of whether the Emirate was the "alter ego" of the Commit-

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Venezolana, a foreign state agency, which had instituted the action and tried the merits of its own claims as well as the defendants' counterclaims, did not raise a sovereign immunity defense at all and the district court, therefore, *sua sponte*, concluded after trial that it had waived its sovereign immunity defense. In *Sea Lift*, the defendant did not raise the defense of sovereign immunity until the closing of arguments at the trial on merits.

[19] In any event, even if the Committee had waived its immunity, it is clear that the Emirate, which had no involvement in either lawsuit until it moved to dismiss on FSIA grounds, did not do so. *Bancec, supra.*

tee, the District Court's decision on this point was clearly erroneous. The courts below also did not consider the torts or takings exception to FSIA immunity which, in any event, would have precluded jurisdiction. Therefore, this Court need not exercise its discretionary jurisdiction to review the issues raised in the petitions.

A. The Act of State Doctrine Bars Petitioners' Claims.

Pursuant to this Court's decisions, the Act of State doctrine protects the challenged conduct of the Committee and the Emirate. This doctrine provides that

> every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.

Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 691 n.7 (1976) (citing *Underhill v. Hernandez*, 168 U.S. 250 (1897)). Similarly, in *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400, 405 (1990), this Court stated:

> In every case in which we have held the act of state doctrine applicable, the relief sought or the defense interposed would have required a court in the United States to declare invalid the official act of a foreign sovereign performed within its own territory.

Id. at 405 (citations omitted). The Act of State doctrine "is a rule of decision under which an act meeting the definition . . . is binding on the court." *Allied Bank Int'l v. Banco Credito Agricola*, 757 F.2d 516, 520 (2d Cir.) (citations omitted), *cert. dismissed*, 473 U.S. 934 (1985).

The claims asserted against the Committee (and the Emirate) in the Supplemental Complaints are based on *acts which came to fruition* in Dubai, *i.e.*, the adjudication in Dubai of claims presented in Dubai for payment

in Dubai from assets located in Dubai, and thus fall within the Act of State doctrine. *Asociacian de Reclamantes v. United Mexican States*, 561 F. Supp. 1190, 1199-1200 (D.D.C. 1983), *aff'd on other grounds*, 735 F.2d 1517 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1051 (1985).

The Act of State doctrine is similarly applicable to Drexel's claims pertaining to the Emirate's acquisition of the UBME shares in which Drexel purportedly had a security interest. The Emirate was physically in the position to present a *fait accompli* with respect to the acquisition of the UBME shares, which were shares in a Dubai chartered bank, the legal situs of which was in Dubai. *See Banco Nacionale de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964); *Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co.*, 392 F.2d 706, 715 (5th Cir.), *cert. denied*, 393 U.S. 924 (1968).

B. Petitioners' Claims Are Barred by the Doctrine of Judicial Immunity.

Since the gravamen of the claims asserted in the Supplemental Complaints is the Committee's adjudication of Petitioners' claims in the Dubai insolvency proceedings, the Committee's activities are immune under the doctrine of judicial immunity as propounded by this Court. The 1984 Decree provided for such immunity for the Committee under the law of Dubai. EA 10a, ¶ 9. The U.S. law of immunity for judicial or quasi-judicial acts is no different. *See Stump v. Sparkman*, 435 U.S. 349, 356 (1978); *Butz v. Economou*, 438 U.S. 478, 513-17 (1978); *Ashelman v. Pope*, 793 F.2d 1072, 1075, 1078 (9th Cir. 1986); *Winslow v. Romer*, 759 F. Supp. 670 (D. Colo. 1991) (bankruptcy judge entitled to absolute judicial immunity). Thus, the Committee's acts are entitled to judicial immunity and the Emirate should likewise be immune even if the acts of the Committee could be attributed to the Emirate.

C. The Emirate Was Not the "Alter Ego" of the Committee.

Even if subject matter jurisdiction existed under the FSIA with respect to the Committee (which it does not), no such jurisdiction would exist with respect to the Emirate unless the acts of the Committee can be attributed to the Emirate. This would apply whether a purported waiver or the commercial activity exception is at issue. To the extent that the District Court based the Emirate's liability on acts of the Committee, as its purported agent, it ignored settled precedent of this Court that an "agency or instrumentality" of a foreign state is *presumed* to be independent of the foreign state for purposes of attributing liability. *See Bancec*, 462 U.S. at 627-28. It is well recognized that this presumption of separateness "is not to be lightly overcome." *Hercaire Int'l, Inc. v. Argentina*, 821 F.2d 559, 565 (11th Cir. 1987). *See also Letelier v. Republic of Chile*, 748 F.2d 790, 794 (2d Cir. 1984), *cert. denied*, 471 U.S. 1125 (1985); *Foremost-McKesson*, 905 F.2d at 444; *Hester Int'l Corp. v. Federal Republic of Nigeria*, 879 F.2d 170, 176 (5th Cir. 1989).

Despite the Emirate's submission of factually uncontroverted sworn declarations that the Emirate did not direct or control the Committee, the District Court (a) made no factual findings on the point, (b) did not even discuss the presumption of independence set forth in the *Bancec* case, (c) did not discuss what principles of agency law it was relying upon, and (d) merely stated in *ipse dixit* fashion that the Committee was the Emirate's agent and that, therefore, the Emirate was bound by the Committee's acts. The District Court's error on this point was an additional valid ground for reversal in the Court of Appeals with respect to claims against the Emirate.[20]

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[20] Even if the essential act upon which the claims against the Emirate are based were not the Committee's adjudication of Petitioners' claims in 1991, any claims against the Emirate pertaining to its acquisition of the UBME shares or issuance of sovereign

D. Claims of Misrepresentation, Abuse of Process or Interference with Contractual Rights Are Barred by 28 U.S.C. § 1605(a)(5)(B).

The decisions below also did not need to address Petitioners' attempt to artfully recast (as "commercial activity") allegations of misrepresentation, interference with contract rights, and abuse of process—which are specifically designated as immune activity under § 1605(a)(5)(B). This Court has warned against pleading ploys designed to avoid the restrictions of the FSIA. *Nelson*, 113 S. Ct. at 1480. *See also Gregorian v. Izvestia*, 871 F.2d 1515, 1522 n.4 (9th Cir.), *cert. denied*, 493 U.S. 891 (1989); *Preston v. United States*, 596 F.2d 232, 238 (7th Cir.), *cert. denied*, 444 U.S. 915 (1979) (under analogous Federal Tort Claims Act, 28 U.S.C. § 2680(a)). Thus, Petitioners' claims based on misrepresentation, interference with contract rights or abuse of process are immune under the specific provisions of § 1605(a)(5)(B). *See Gregorian, supra.*

E. Claims Based on the Exercise of Discretion by the Committee Are Barred by 28 U.S.C. § 1605(a)(5)(A).

Moreover, the gravamen of Petitioners' claims, *i.e.*, the Committee's adjudication in Dubai, involved the quintessential exercise of discretion by a judicial or quasi-judicial

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decrees in 1983 and 1984 would be time-barred. Since the FSIA does not contain a specific statute of limitations, federal courts will look to analogous state law. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 462 (1975); *see Goodsons & Co. v. Federal Republic of Nigeria*, 558 F. Supp. 1204, 1207 (S.D.N.Y. 1983). Under any analogous New York limitations statute, Petitioners' claims would be time barred. *See* N.Y. Civ. Prac. L. & R. § 214.4 (McKinney's 1990) (actions "to recover damages for injury to property" must be commenced within three years); and § 213.1 (actions "for which no limitation is specifically prescribed by law" must be commenced within six years). Those claims would also be time-barred under the most analogous federal statute, the Federal Tort Claims Act, 28 U.S.C. § 2401(b) (taking claims against U.S. government must be commenced within 2 years).

authority. Since the exercise of discretion is protected *even* if that discretion is abused under 28 U.S.C. § 1605 (a)(5)(A), the Committee's activities are immune.

F. The Takings Exception to the FSIA Is Not Applicable.

Petitioners' takings claims do not meet the requirements of the specific "takings" exception to sovereign immunity found in § 1605(a)(3) of the FSIA. Neither the District Court nor the Court of Appeals reached that issue, although it was briefed in both courts.[21]

Firstly, what was involved was an adjudication of claims filed in an insolvency proceeding, not a "taking" by a foreign state of property owned by aliens. Secondly, even if the unilateral acquisition of the UBME shares by the Emirate in 1983 could be viewed as a "taking", there was no taking in violation of international law, since the alleged taking was not discriminatory, there was proper compensation to those who proved their entitlement, and the acquisition was for a public purpose. *Siderman*, 965 F.2d at 711-12.[22] Thus, the acquisition of the UBME shares had the valid public purpose of preventing the failure of a Dubai-chartered bank and financial catastrophe in the region. *Drexel IV* at 10, findings of fact nos. 63 and 22, conclusion of law no. 21. Also, the Emirate paid more than adequate compensation for the shares to the Committee which, pursuant to the 1984 Decree, was to

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[21] In this Court Petitioners appear to rely on § 1605(a)(2) and not on § 1605(a)(3).

[22] Moreover, "property" under the "takings" exception does not include intangible property rights, such as contract rights. *Canadian Overseas Ores Ltd. v. Compania de Acero del Pacifico S.A.*, 528 F. Supp. 1337, 1346 (S.D.N.Y. 1982), *aff'd on other grounds*, 727 F.2d 274 (2d Cir. 1984).

pay such compensation to claimants demonstrating their entitlement thereto.[23]

Similarly, the Committee's adjudication, in 1991, that Holdings was not obligated to pay the contractual debts of Commodities and that Drexel had no valid security interest in the UBME shares, was a public act in furtherance of a public judicial purpose. Neither the Emirate's decrees nor the Committee's activities were discriminatory and did not single out the claims of any particular class or nationality of creditor, or, indeed, Drexel or Refco. Finally, the fact that the Galadari and Commodities insolvency estates are substantially without assets merely reflects a risk assumed in any commercial transaction and cannot constitute a taking without adequate compensation.

Finally, Petitioners also could not satisfy the jurisdictional nexus requirements of the "takings" exception which requires that the property taken (or any property exchanged for such property) must be either: (i) present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or (ii) owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in commercial activity in the United States. The Committee did not engage in any commercial activity in the United States. The Committee merely participated in the District Court to seek comity deference with respect to its own proceedings in Dubai. That does not constitute commercial activity.

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[23] The District Court previously held that the only evidence adduced indicated that the UBME shares claimed by Drexel were "valueless" at the time the Dubai insolvency proceeding was instituted. *Drexel IV* at 10, finding of fact no. 62. Drexel admits in its Supplemental Complaint that the Emirate transferred "in excess of $20 million" to the Committee, which the Committee, according to the 1984 Decree, was to pay to claimants who could establish their rightful entitlement to the proceeds. EA 8a-9a.

CONCLUSION

The separate petitions of Drexel and Refco for a writ of certiorari to the Second Circuit should be denied in their entirety.

Respectfully submitted,

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March 31, 1994

APPENDIX

APPENDIX

RELEVANT STATUTORY PROVISIONS

28 U.S.C. §§ 1603-1605 provide in relevant part:

§ 1603. Definitions

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

§ 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such prop-

erty is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

* * * *

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit or interference with contract rights;

* * * *

TRANSLATION

Decree No. (3) of 1984
concerning the financial affairs
of Abdul Wahab Ebrahim Galadari

WE, Maktoum bin Rashid Al Maktoum, Crown Prince, Deputy Ruler of the Emirate of Dubai,

AFTER REVIEWING Decree No.5/83 issued on 12 November 1983 concerning the Union Bank of the Middle East Limited (hereinafter referred to as the "Bank") and Decree No.6/83 issued on 26 November 1983 amending Decree No. 5/83,

AND in order to protect the rights of all those concerned with the financial affairs of Abdul Wahab Ebrahim Galadari,

HEREBY DECREE as follows:

1. A committee of receivers shall be established comprised of the following persons:

   (1) Abdulla Hassan Al Rostamani

   (2) Hassan Ibn Al Sheikh

   (3) Abdulla Lootah

   (4) Nabil Aref

   hereafter referred to as the "Committee".

The Quorum necessary at meetings for the passing of decisions by the Committee shall be a majority of the foregoing persons present in person. Decisions at meetings of the Committee shall be passed by a simple majority of those present.

2. In this Decree, the following terms shall, unless the context otherwise requires, have the meanings set out opposite each of them:

"Mr. Galadari" means Abdul Wahab Ebrahim Galadari;

"Galadari Assets" means all assets of any kind belonging to Mr. Galadari both moveable and immoveable and situated within and outside the United Arab Emirates including but not limited to the following:—

(a) all shares owned by Mr. Galadari in any incorporated companies;

(b) all interests owned by Mr. Galadari in any partnerships;

(c) all assets of any businesses including the goodwill thereof owned by Mr. Galadari;

(d) all personal effects and all other assets of any kind owned by Mr. Galadari;

(e) all assets which are owned by Mr. Galadari, but which are held and/or registered in the name of a third party as nominee;

(f) all assets of the kind set forth in paragraphs (a) to (e) above which have been transferred or otherwise disposed of without full consideration by Mr. Galadari to any person during the period of three years expiring on the date of this Decree.

"Galadari Companies" means:

(a) each incorporated company of which Mr. Galadari directly or indirectly (i) owns a majority of the issued shares carrying the right to vote at a general meeting thereof or (ii) is entitled to appoint a majority of the directors or (iii) has the right to manage the affairs;

(b) each partnership of which Mr. Galadari or any company included under Sub-Article (a) of this definition owns directly or indirectly an interest; and

(c) each business establishment which is owned directly or indirectly by Mr. Galadari.

PROVIDED THAT neither the Bank nor any company in which the Bank is the owner of shares at the date of this Decree shall for the purposes of this Decree be regarded as a Galadari Company nor any shares in the Bank as a Galadari Asset.

"Secured Debts" means debts secured by Galadari Assets and/or assets owned by Galadari Companies and/or the Bank Shares (as hereinafter defined) as follows:

(a) lands and any buildings thereon, if the security taken is by way of registered legal mortgage;

or

(b) assets other than those stated in the preceding paragraph, if the security taken is:

(i) by way of a notarised mortgage document; and

(ii) the mortgaged assets are in the possession of the mortgagee; and

(iii) registered if capable of registration.

3. As of the date of this Decree, Mr. Galadari ceases to have the right or power to deal with his financial affairs directly or indirectly including but not limited to the right to manage, sell, purchase or encumber any asset, to pay or receive monies, to incur obligations, or to bring or defend any legal proceedings in any court or tribunal.

4. For the purposes of this Decree, all the Galadari Assets are hereby vested in the Committee and the Committee shall also be entitled to receive the proceeds of the shares of the Bank owned by Mr. Galadari or any of the Galadari Companies (hereinafter called the "Bank Shares") PROVIDED THAT all rights in respect of the Bank Shares including the

power to sell the Bank Shares but excluding the right to receive the proceeds thereof shall be vested in the Provisional Board of the Bank (hereinafter called the "Provisional Board").

5. The Committee is empowered without the need to comply with any of the formalities contained in the relevant constituting documents to appoint any of it own members and/or delegates as directors of those Galadari Companies of which Mr. Galadari directly or indirectly would be entitled to appoint all or any of the directors, in place of the directors thereof appointed prior to the issue of this Decree.

6. Payment of all debts incurred by Mr. Galadari or those of the Galadari Companies established in the United Arab Emirates which arise from transactions entered into up to close of business on 23 November 1983, being the date on which the Provisional Board assumed control of the Galadari Assets, shall be held in suspense, pending the orderly realisation of all assets. No interest shall accrue whether before or after the issue of this Decree on such debts except bank, contractual or court interest which shall accrue at the rate agreed or as decided by the Court excluding penalty interest.

7. The Committee shall have power notwithstanding any restrictions contained in any of the constituting documents of the Galadari Companies:

   (a) Without prejudice to the provisions of Article 12 of this Decree to bring or defend any legal proceedings on behalf of Mr. Galadari or any Galadari Companies or in relation to Galadari Assets;

   (b) to terminate or to carry on and manage the respective businesses of the Galadari Companies so far as may be necessary for the sale of the Galadari Assets and/or Galadari Companies;

(c) to meet and pay all obligations entered into into since 23 November 1983 including the costs of management of the Galadari Companies and Galadari Assets;

(d) to require creditors to submit claims in such form, accompanied by such proofs, and within such period as the Committee shall determine;

(e) to admit claims in whole or in part and to make any compromise or arrangement with creditors or persons having any claims, present or future, against any Galadari Companies, Galadari Assets or Mr. Galadari;

(f) to compromise debts and liabilities owed to Mr. Galadari, the Galadari Companies and Galadari Assets;

(g) to sell the Galadari Assets and assets owned by the Galadari Companies with power to transfer the same to any person;

(h) to sign and deliver all necessary documents and do all such other acts and things as they deem necessary for the beneficial disposal of the Galadari Assets and assets owned by the Galadari Companies;

(i) where Secured Debts are owed to creditors, to assume control and to dispose of the assets charged by way of security for the Secured Debts (other than the Bank Shares) and to apply the proceeds of each such asset including each charged Bank Share in the following order:

(1) liabilities and expenses incurred by the Provisional Board and/or the Committee after 12 November 1983 in connection with such assets;

(2) fees and taxes of the Dubai and the United Arab Emirates Governments imposed in respect of such assets;

(3) salaries and other entitlements of employees in respect of a Galadari Asset or a Galadari Company owning such assets;

(4) distributions to the secured creditors up to the amount of the debt secured on that asset;

(5) the balance of the proceeds, if any, in the manner set out in Sub-Article (j) below;

(j) to distribute the proceeds separately of realisations from the assets not included under Sub-Article (i) above of each Galadari Company to its creditors and proprietors and the Galadari Assets or the proceeds thereof not included under Sub-Article (i) above to their respective creditors and proprietors by applying the same in the following order:

(1) liabilities and expenses incurred by the Provisional Board and/or the Committee after 12 November 1983 other than payments made under Sub-Article (i) above;

(2) fees and taxes of the Dubai and the United Arab Emirates Governments incurred other than payments made under Sub-Article (i) above;

(3) salaries and other entitlements of employees other than payments made under Sub-Article (i) above;

(4) debts incurred prior to 24 November 1983 on a pro rata basis up to the amount of such debts;

(5) distributions to proprietors, PROVIDED THAT if there is a surplus in respect of Galadari Assets after discharging all lia-

bilities of Mr. Galadari, debts remaining unpaid to creditors of Galadari Companies as at 23 November 1983 shall be discharged on a pro rata basis up to the amount of such debts, prior to a distribution to Mr. Galadari.

(k) to appoint such advisors and agents, and delegate such of the powers hereby granted to the Committee under this Article other than Sub-Article (e) hereof, as the Committee shall think necessary from time to time;

(l) to exercise such of the powers hereby granted to it in relation to Mr. Galadari, the Galadari Assets and assets owned by the Galadari Companies situated outside the United Arab Emirates as shall be acceptable under the relevant law;

8. All acts done or omitted to be done by the Provisional Board, their advisors Messrs. Peat, Marwick, Mitchell & Co and their Partners, and other delegates of the Provisional Board, from 12 November 1983 up to the date of this Decree on their own behalf or on behalf of Mr. Galadari, and in relation to the Bank, the Bank Shares, the Galadari Assets and the Galadari Companies, are hereby ratified and confirmed as of the date of such acts or omissions. The aforesaid persons shall not be personally liable for acts they have done or not done during the said period in respect of the said matters.

9. No liability personal or otherwise shall attach to the Provisional Board, the Committee, or their advisors and agents, or the Judicial Committee hereinafter referred to, in respect of acts performed in accordance with this Decree.

10. All rights accruing to and obligations incurred by the Provisional Board in connection with Mr. Gala-

dari, the Galadari Assets and the Galadari Companies (including but not limited to the costs of management thereof) since 12 November 1983, are hereby transferred to and assumed by the Committee.

11. The Committee shall keep proper books of account during the period from 24 November 1983 until the disposal of all Galadari Assets and shall prepare an account of receipts and payments as at 23 November each year and upon the termination of their appointment.

12. (a) All actions or proceedings of any kind instituted in Dubai prior to the date thereof in respect of Mr. Galadari, the Galadari Companies, the Galadari Assets or the Bank Shares, are hereby stopped.

(b) All attachments and orders for attachment obtained in the Dubai Courts or elsewhere against Mr. Galadari, the Galadari Companies, the Galadari Assets or the Bank Shares, and enforceable by the Dubai Courts and their respective Execution Departments, are hereby vacated.

(c) No action, attachment or proceeding shall be permitted to be instituted against Mr. Galadari, the Galadari Companies, the Galadari Assets, or the Bank Shares with effect from the date of this Decree.

(d) The enforcement by the Dubai Courts and their respective Execution Departments of all judgments and orders obtained in the Dubai Courts or elsewhere against Mr. Galadari, the Galadari Companies, and the Galadari Assets or the Bank shares, is hereby stopped.

(e) All cases and applications which have already been instituted and all judgments or orders which have been obtained in Dubai Courts

against Mr. Galadari, the Galadari Companies, the Galadari Assets, or the Bank Shares, shall be transferred by the Dubai Courts to the Committee and any claims after the issue of this Decree shall be submitted directly to the Committee.

(f) The Committee is hereby empowered to issue decisions which shall be in writing and shall have the effect of an order or judgment.

13. A judicial committee shall be established comprised of the following persons:

1. Hassan Ismail Qasim

   Deputy President of the Supreme Court of Appeal, Dubai

2. Saeed Juma Al Naboodah

   Chairman, Dubai Chamber of Commerce and Industry

3. Majid Hamad Rahma Al Shamsi

hereinafter called the "Judicial Committee".

All members shall be present in person at hearings, and all decisions by the Judicial Committee shall be passed unanimously or by a majority and issued in writing.

14. (a) Any creditor or other person having a claim against Mr. Galadari, the Galadari Companies, the Galadari Assets or Bank Shares may appeal to the Judicial Committee against any decision issued by the Committee within thirty days from the issue of such decision provided such appeal shall only be in relation to the amount claimed and the validity of any security connected therewith.

(b) The ruling of the Judicial Committee, after hearing the appellant and the Committee, shall be in writing and shall be final and absolute.

(c) The Judicial Committee shall have the power to award costs in its discretion.

15. Any final decision of the Committee or the Judicial Committee in favour of the Committee may be executed by the Committee and no other person through the Execution Department of the Dubai Courts.

16. Subject to the provisions of this Decree the Judicial Committee shall comply with the laws in force in Dubai.

17. This Decree shall come into force from the date of its issue and shall be published in the Official Gazette.

Maktoum bin Rashid Al Maktoum
Crown Prince, Deputy Ruler of Dubai

Issued on 17th April, 1984 A.D.
Corresponding to 17th Rajab, 1404 A.H.

Nos. 93-1361 and 93-1389

FILED
MAR 31 1994
CLERK OF THE COURT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

THE DREXEL BURNHAM LAMBERT GROUP INC. and REFCO, INC.,

Petitioners,

v.

THE COMMITTEE OF RECEIVERS FOR A.W. GALADARI and THE EMIRATE OF DUBAI, UNITED ARAB EMIRATES,

Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF IN OPPOSITION FOR RESPONDENT THE COMMITTEE OF RECEIVERS FOR A.W. GALADARI

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March 31, 1994

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QUESTIONS PRESENTED

1. Whether a quasi-judicial agency or instrumentality of a foreign state waived its immunity, either expressly or impliedly, under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611, where it appeared in an action in a representative capacity on behalf of two non-immune defendants, did not affirmatively seek any relief other than comity deference to its own proceedings abroad, and thereafter asserted its FSIA defenses as soon as relief was sought against it and as soon as it was added as a party?

2. Whether the third clause of the commercial activity exception to the Foreign Sovereign Immunities Act by its terms denies an agency or instrumentality of a foreign state immunity from suit in the United States over claims based upon its sovereign acts of adjudicating claims asserted in Dubai where those sovereign acts bore no more than an attenuated connection to alleged commercial activities elsewhere?

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OCTOBER TERM, 1993

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THE DREXEL BURNHAM LAMBERT GROUP INC.
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THE COMMITTEE OF RECEIVERS FOR A.W. GALADARI
and THE EMIRATE OF DUBAI,
UNITED ARAB EMIRATES,
Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF IN OPPOSITION FOR RESPONDENT THE COMMITTEE OF RECEIVERS FOR A.W. GALADARI

Respondent The Committee of Receivers for A.W. Galadari ("the Committee") respectfully requests that this Court deny the petitions for a writ of certiorari filed by The Drexel Burnham Lambert Group Inc. ("Drexel") and Refco, Inc. ("Refco") that seek review of the decision of the United States Court of Appeals for the Second Circuit.[1]

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[1] In compliance with Rule 29.1 of the Rules of this Court, the Committee represents that it is a judicial and quasi-judicial agency or instrumentality created by a sovereign decree of the Emirate of Dubai. The Committee does not have any parent or subsidiary companies.

OPINIONS BELOW

The decision of the court of appeals is reported at 12 F.3d 317 (2d Cir. 1993) (Pet. App. 1a-30a).[2] The district court decision that was reversed by the court of appeals is reported at 810 F. Supp. 1375 (S.D.N.Y. 1993) (Pet. App. 33a-72a).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§ 1602-1611, are set out in Appendix A, 1a-3a.

STATEMENT OF THE CASE

Pursuant to Rule 15.1 of the Rules of this Court, Respondent provides the following statement of facts to correct the misstatements contained in the Drexel and Refco petitions.

A. The Appointment And Activities Of The Committee Of Receivers

The Committee of Receivers was created by Emiri Decree No. 3 of the Emirate of Dubai ("the Emirate") in April 1984 to (1) marshal and liquidate the non-banking assets and businesses of A.W. Galadari, a Dubai citizen, and (2) adjudicate the claims of creditors. Pet. App. 4a. In 1983, Galadari and his businesses, which included the Union Bank of the Middle East ("UBME") and A.W. Galadari Commodities ("Commodities"), a commodities trading business, had experienced a severe liquidity crisis that led to the government takeover of the UBME. Pet. App. 4a.

Decree No. 3 (Em. App. 4a-13a) set forth a comprehensive bankruptcy scheme for the distribution of the

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[2] "Pet. App." refers to the Appendix to either the Drexel or Refco Petitions for Certiorari, which are identical; "App." refers to the Appendix to this Brief in Opposition; "Em. App." refers to the Appendix to the Brief in Opposition of the Emirate of Dubai.

proceeds realized from the sale of Galadari's non-banking assets among creditors. It appointed as Committee members four leading Dubai citizens, vested them with control over all Galadari non-banking assets and authorized them to bring or defend any legal proceedings on behalf of Galadari or any Galadari entity.[3]

The Decree authorized the Committee "to terminate or to carry on and manage the respective businesses of the Galadari Companies" but only "so far as may be necessary for the sale of the Galadari Assets and/or Galadari Companies." Em. App. 7a. Although the Committee was required, at least initially, to continue to operate temporarily certain assets and businesses formerly owned by various Galadari entities, it did so only until such assets could be sold or otherwise disposed of.[4]

The Committee's decisions are subject to review by a specially created judicial committee. To date the Committee has administered and adjudicated the claims of more than 700 creditors with claims totalling more than $770,000,000 against various Galadari entities. It has distributed approximately $400,000,000 to creditors of various Galadari entities (including A.W. Galadari Holdings (Private) Ltd. ("Holdings")). The approximately 60 creditors (including Drexel and Refco) who have asserted claims aggregating more than $161,000,000 against Galadari individually and/or Commodities have not received any distribution from the Committee be-

[3] The district court found the Committee members to be "independent and capable individuals" who did not suffer from any conflict of interest that would prohibit them from serving as trustee under the U.S. Bankruptcy Code. *Drexel Burnham Lambert Group, Inc.* v. *Galadari*, No. 84 Civ. 2602, 1987 WL 6164, *22 (S.D.N.Y. Jan. 29, 1987).

[4] The Committee did not engage in any such activity at any time in the United States. Nor did it engage in any such activity on behalf of Galadari's commodities trading business, any suggestion to the contrary by Petitioners notwithstanding (Drexel Pet. 5; Refco Pet. 6).

cause neither Galadari nor Commodities has any assets from which a distribution could be made. All of these approximately 60 creditors have been treated alike.

B. The Original *Drexel* and *Refco* Actions

The complaints in both the *Drexel* and *Refco* actions, filed in 1984, asserted breach of contract claims solely against Galadari and Commodities. Pet. App. 5a; 7a. The Committee was not named or even mentioned in those complaints. *See* Pet. App. 5a; 7a. These original claims are not at issue in this proceeding because liability has since been admitted. It is only the later-filed claims against the Committee and the Emirate—asserted for the first time in 1992—that are the subject of this appeal.[5]

1. *The Drexel Case*

When the Committee appeared in the *Drexel* case, it did so solely in its representative capacity "on behalf of Galadari and Commodities" by filing an answer that asserted various affirmative defenses. Pet. App. 5a. The Committee did not invoke the defense of sovereign immunity at that time because the complaint asserted only breach of contract claims against Galadari and Commodities, two non-immune defendants. Promptly after filing an answer, the Committee moved to dismiss or stay the *Drexel* action in deference to the Committee's own receivership proceedings in Dubai. Pet. App. 5a. The district court granted the motion, but the court of appeals reversed and remanded for additional fact findings.[6] Pet. App. 6a.

---

[5] Drexel and Refco repeatedly mischaracterize the claims against the Committee as claims for "nonpayment" or "refusal to pay" or "reneging on their obligations to pay" the debts owed by Galadari and Commodities. *E.g.*, Drexel Pet. 19; Refco Pet. 15. The Committee, however, was not the obligor on those debts. Petitioners' claims against the Committee are based solely on the Committee's adjudication in April 1991.

[6] *Drexel Burnham Lambert Group, Inc.* v. *Galadari*, 777 F.2d 877, 881 (2d Cir. 1985).

In 1986, Drexel sought to enjoin the Committee from proceeding with its own adjudication of Drexel's claim in Dubai. *Id.* In opposing the motion, the Committee noted that because relief was being sought against it for the first time, Drexel should be required to amend its complaint to add the Committee as a party, so that the Committee could assert its FSIA defenses properly. *Id.* The district court, however, denied the motion without requiring an amended pleading. *Id.* In January 1987 the district court issued a stay of the Drexel action on the grounds of comity, holding that the procedures set forth in the Decree were consistent with our "basic notions of fairness and due process" and were "fundamentally fair to all creditors." Pet. App. 6a.

2. *The Refco Case*

Refco brought suit in New York State Supreme Court, seeking to collect a debt arising from commodities trading pursuant to a letter agreement. The Committee first appeared in the *Refco* case solely in its representative capacity in opposition to Refco's motion for an attachment of certain real property. The Committee's opposition was based, *inter alia*, on the grounds of comity. Pet. App. 7a.

The state court denied Refco's motion but *sua sponte* added the Committee to the caption as an additional defendant. *Id.* The Committee promptly filed a motion to dismiss, asserting that it was immune from suit under the FSIA. *Id.* That motion was later withdrawn without prejudice by agreement between the parties, as a result of which the prosecution of the *Refco* action was stayed by agreement pending the adjudication of Refco's claim in Dubai. Pet. App. 7a-8a.

Dissatisfied with the progress of proceedings in Dubai, in 1990 Refco sought to reactivate its state court action, whereupon the Committee removed the *Refco* case to federal court. *Id.* Refco sought to remand its case to state

court, but the district court denied Refco's motion. In so doing it held that the Committee functioned as a "judicial or quasi-judicial body" and was "an agency or instrumentality of a foreign state" and thus a "foreign state" within the meaning of the FSIA. *Refco, Inc.* v. *Galadari*, 755 F. Supp. 79, 82 (S.D.N.Y. 1991).

C. Petitioners' Efforts To Lift The Stay

From early 1987 until late 1990 the parties focused their attention on the Committee's receivership proceedings in Dubai. In those proceedings, Drexel and Refco claimed that even though their contract claims were asserted against Galadari and Commodities, they should be paid out of the assets of Holdings because Commodities allegedly was a division of Holdings rather than a separate partnership. Pet. App. 8a. Holdings had significant liquid assets whereas Commodities did not. Pet. App. 8a.[7]

In late 1990 and early 1991, respectively, Drexel and Refco moved to vacate the stay on the grounds that the Committee had unfairly delayed its decision on their claims and failed to accord them due process in Dubai. Pet. App. 8a. The motions were denied, conditioned on the Committee's issuance of a decision by April 16, 1991.[8] On April 14, 1991, the Committee issued its de-

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[7] The proceedings in Dubai were complex and extremely time-consuming. The hearings on the Holdings/Commodities issue alone included oral testimony from more than 20 witnesses that consumed more than 2,650 pages of transcript; more than 250 exhibits were submitted and more than 20 expert opinions were presented on the issues raised.

[8] *Drexel Burnham Lambert Group, Inc.* v. *Galadari*, 127 B.R. 87, 107 (S.D.N.Y. 1991); *Drexel Burnham Lambert, Inc.* v. *Galadari*, 135 B.R. 719, 728 (S.D.N.Y. 1991). These two opinions, which criticized the Committee and its former counsel for their conduct, were nonappealable. Therefore the Committee has had no opportunity to demonstrate why the district court's criticisms were unjustified.

cision in which it admitted Drexel's and Refco's claims against Galadari and Commodities but rejected their claim that Commodities was a division of Holdings. Appendix B, App. 4a-39a; Pet. App. 9a.

Drexel and Refco thereupon renewed their motions to lift the stay. *Id.* The district court granted the motions, holding that the proceedings were no longer entitled to comity deference because of the manner in which the Committee had conducted them.

D. The Claims Against The Committee

Following the decision, the Committee served an amended answer to the *Drexel* complaint. *Id.* The defense of sovereign immunity again was not raised because the only claims pending were breach of contract claims against non-immune defendants. The Committee also served its first responsive pleading to the *Refco* complaint in which the defense of sovereign immunity was asserted (as a precaution) because of the *sua sponte* naming of the Committee as an "additional defendant" by the state court. Pet. App. 8a.[9]

In October 1991, Petitioners moved for leave to file amended and supplemental complaints so that for the first time they could add the Committee and the Emirate (as its "alter ego") as defendants and assert entirely new claims directly against them. Pet. App. 10a. (They also sought to name Holdings as a defendant.) The Committee objected on the grounds that such an amendment would be futile, *inter alia*, given the existence of FSIA defenses. *Id.*

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[9] Consistent with its decision, the Committee also (a) deleted all but one, comity, of the affirmative defenses asserted in its original answer to the Drexel complaint and (b) admitted the allegations as to the amounts of the debts owed Petitioners by Galadari and Commodities. This left Drexel and Refco in a position to move immediately for judgment on the pleadings on their breach of contract claims, which they have chosen not to do.

The district court nevertheless granted Petitioners' motion (Pet. App. 10a), stating that the proper time to raise the defense of sovereign immunity was on a motion to dismiss, not in response to a motion for leave to amend. The parties then entered into a stipulation by which counsel for the Committee agreed to accept service of the amended and supplemental complaints on behalf of the Committee "*qua* Committee and as representative of Galadari, Commodities and Holdings" without prejudice to or waiver of any jurisdictional defenses or to the Committee's right to assert the defense of sovereign immunity. Pet. App. 10a-11a.[10]

A month later, Petitioners filed their amended and supplemental complaints which sought money damages from the Committee (and the Emirate) on the grounds that, by virtue of its April 1991 decision, (1) the Committee had "taken" Petitioners' property without just compensation in violation of international law; (2) the Committee was liable for misrepresenting to Petitioners and the district court its intention to adjudicate Petitioner's claims in Dubai promptly and fairly; and (3) the Committee, as successor-in-interest to Galadari and Commodities, was liable for refusal to pay their debts. Pet. App. 10a.

The Committee and the Emirate promptly moved to dismiss on the grounds that they were immune from suit under the FSIA. Pet. App. 11a.[11] They also argued that

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[10] The stipulation entered into by the parties makes abundantly clear that the Committee had preserved its sovereign immunity defense. *See* Pet. App. 10a-11a (quoting stipulation).

[11] The Committee also filed answers to the amended and supplemental complaints on behalf of defendants Galadari and Commodities. Consistent with its prior actions, the Committee did not assert the defense of immunity to the original breach of contract claims against these defendants. The Committee did not enter an appearance on behalf of newly named defendant Holdings, leaving Petitioners free to seek a default judgment.

the suit was barred by the Act of State doctrine, the doctrine of judicial immunity and the applicable statutes of limitation. *Id.* The district court denied the motions (Pet. App. 33a-72a), finding that the implied waiver and commercial activity exceptions to sovereign immunity applied.

E. The Decision Below

Reversing the district court, the court of appeals held that jurisdiction did not exist under either the waiver or commercial activity exceptions. Pet. App. 3a. The court emphasized that, consistent with the decisions of every other circuit, the waiver exception of the FSIA must be "construed narrowly" (Pet. App. 15a) and that any waiver must be "unmistakable" and "unambiguous." Pet. App. 17a. Rejecting arguments that the Committee had waived its immunity by failing to invoke the FSIA previously in connection with the claims asserted against Galadari and Commodities, the court held that the Committee had timely invoked its immunity after it was named as a defendant in the amended and supplemental complaints in 1992 and thereafter moved to dismiss. The court also held that the Committee had consistently signalled its intent to invoke FSIA immunity, either by invoking immunity or by reserving the right to do so, on no less than five previous occasions during the course of the litigation. Pet. App. 17a-18a. It concluded that such actions did not provide evidence of an "unmistakable" and "unambiguous" waiver of FSIA immunity. Pet. App. 18a.

As to commercial activity, the court of appeals held that Petitioners' 1992 claims against the Committee and the Emirate did not fall within the third clause of the FSIA's commercial activity exception. Pet. App. 23a-27a. The court found that the gravamen of such claims was not commercial activity. They were "based upon" acts that were essentially judicial and therefore sovereign, *i.e.*,

the adjudication by the Committee in Dubai of the merits of Petitioners' claims asserted there. Pet. App. 25a.

The court of appeals also found that the adjudication of Petitioners' claims did not occur "in connection with" any commercial activity of the Committee elsewhere. After expressing serious doubt as to whether the Committee had engaged in any "commercial activities" in marshalling and liquidating assets (Pet. App. 24a n.3, 25a), the court held that, even assuming the Committee had engaged in some commercial activity, such activity was too "tangential" or "attenuated" to the Committee's adjudication of Petitioners' claims to satisfy the third clause of Section 1605(a)(2).

In dissent, Chief Judge Newman differed only with what he viewed as the majority's premature conclusion that the Committee's adjudication of Petitioners' claims was a judicial act, favoring discovery on the issue. Pet. App. 29a. The dissent neither disagreed with nor even discussed the majority's conclusion that immunity had not been waived or the majority's legal analysis of Sections 1605(a)(1) and (2).

REASONS FOR DENYING THE PETITIONS

1. There is no reason to review the decision below on the question of waiver. Petitioners' request for review on this issue primarily disputes the treatment of the facts by the court of appeals, which is not a proper reason for review by this Court. The court below analyzed the facts in light of the statute and the case law and concluded that as soon as claims were asserted or relief sought against the Committee itself, the Committee unmistakably and unambiguously asserted, or preserved its right to assert, its FSIA defenses.

Nor did the Committee waive its sovereign immunity defenses to the 1992 causes of action by appearing in a representative capacity in 1984 on behalf of the original,

non-immune defendants in the *Drexel* and *Refco* actions. The court of appeals listed five separate occasions on which the Committee made clear, before Drexel or Refco filed their amended and supplemental complaints, that the Committee intended to invoke its sovereign immunity defenses under the FSIA when and where appropriate.

On this record and consistent with all relevant decisions by other courts of appeals, the court below properly concluded that no waiver had occurred here. There being no important question of interpretation under the FSIA and no conflict among the courts of appeals, review by this Court is unnecessary.

2. There is no reason to review the decision of the court below on the inapplicability of the commercial activity exception to sovereign immunity. Petitioners' arguments in favor of review are based on a misreading of the decision below.

The third clause of the commercial activity exception requires Petitioners to demonstrate that their claims are "based upon" an "act outside the territory of the United States" that is "in connection with" commercial activity elsewhere, which act has a direct effect in the United States. Contrary to the claims of Petitioners, the court below did not require that the "act outside the territory of the United States" that forms the basis for the complaints here be a "commercial" act or that the "direct effect" in the United States must result from commercial activity elsewhere. The court merely held that in this case, Petitioners' causes of action are not based upon the doubtful "commercial" activity urged by Petitioners below (the marshalling, managing and liquidating of assets), but rather upon the adjudication of Petitioners' claims in Dubai, an indisputably sovereign act that could not be performed by private parties.

Similarly, the court below did not conclude that the "direct effect" required by clause three of Section 1605

(a)(2) can only flow from a commercial act outside the territory of the United States. The court merely held that in this case, the doubtful commercial activities on which Petitioners based their claims were not "activities that 'cause[d] a direct effect in the United States,' § 1605 (a)(2), upon which the claims of Drexel and Refco are based." Pet. App. 24a. Thus the court linked the "act" that is the basis for the cause of action and the "direct effect" in the United States, just as the statute requires and Petitioners demand.

Finally, focusing on the "in connection with" requirement of the third clause, the court below concluded that where, as here, no more than an attenuated connection exists between the sovereign act on which a claim is based and the activities alleged to be commercial in nature, jurisdiction did not exist. This decision is consistent both with the language of the statute and the recent decisions of this Court in *Saudi Arabia* v. *Nelson*, 113 S. Ct. 1471 (1993), and *Republic of Argentina* v. *Weltover*, 112 S. Ct. 2160 (1992). It does not conflict with the decisions of any other court of appeals. Review by this Court therefore is unnecessary.[12]

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[12] Review is also unnecessary because the court below could have denied the relief sought by Petitioners on several other alternative grounds, including Act of State, judicial immunity and the takings and tort provisions of the FSIA. These grounds are discussed in the Opposition Brief of the Emirate of Dubai (at 20-26), which demonstrates that the questions presented for review by Petitioners may be academic, further emphasizing the lack of any "special or important reasons" for granting certiorari in this case. *See* S. Ct. Rule 10.1.

I. THE DECISION BELOW DOES NOT RAISE ANY IMPORTANT ISSUES CONCERNING WAIVER UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT.

A. The Petitioners Raise Primarily Factual Challenges To The Decision Below.

The court of appeals examined the record in this case and concluded that it did not support a finding of waiver under the FSIA. Pet. App. 18a. Properly analyzing the claims below and distinguishing between the 1984 claims asserted against Galadari and Commodities and the 1992 claims asserted against the Committee, the court of appeals correctly concluded that the Committee not only asserted its sovereign immunity defenses in a timely fashion, *i.e.*, after it was sued, but also that it clearly signalled its intent to assert the defense of sovereign immunity even before it was sued—on at least five separate occasions. Pet. App. 17-18a.[13]

Petitioners disagree with this analysis and seek review by this Court because the court below "ignored the evidence" (Refco Pet. at 19) and "facts of record." Drexel Pet. at 10-11. Petitioners' arguments over the facts only serve to emphasize that certiorari should not be granted in this case. *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."); *see Texas* v. *Mead*, 465 U.S. 1041 (1984) (Stevens, J.).

Moreover, the facts are precisely as the court below found, not as Petitioners seek to rewrite them. The "undisputed facts" (Pet. App. 13a) demonstrate that at the time the Committee first appeared on behalf of Galadari and Commodities in the *Refco* and *Drexel* proceedings, the only claims pending were breach of contract claims

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[13] The court failed to note a sixth prior invocation of immunity, when Petitioners moved for sanctions following the lifting of the stay in the district court.

asserted against non-immune private parties. The Committee could hardly have asserted the defense of sovereign immunity in responding to complaints that sought no relief against it.

As the court below noted, the first time Drexel sought relief against the Committee, as opposed to Galadari or Commodities (in 1986, when Drexel sought an injunction prohibiting the Committee from continuing with its proceedings in Dubai), the Committee immediately raised the defense of sovereign immunity. Pet. App. 17a-18a.[14] Similarly, in the *Refco* case when the New York State Supreme Court *sua sponte* added the Committee to the caption as a defendant, the Committee immediately asserted its immunity under the FSIA by filing a motion to dismiss (which was later withdrawn by agreement without prejudice). Pet. App. 7a. When the Committee first answered the Refco complaint (its name having been added as an additional party), it asserted sovereign immunity as an affirmative defense as a precaution even though the complaint did not assert any claims against the Committee. Pet. App. 8a.

When Drexel and Refco moved in 1991 for leave to amend their complaints to add claims directly against the Committee and the Emirate, the Committee opposed the motion, *inter alia*, on the grounds of sovereign immunity. When Petitioners sought to serve the Committee with their amended complaints, they did so pursuant to a stipulation that expressly preserved the Committee's right to assert its FSIA defenses. Once Petitioners amended their complaints in 1992 to add the Committee as a party

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[14] Other than the Committee's filing of an answer and Drexel's motion for an injunction, the only activity in the *Drexel* case from 1984 until 1991 related to the Committee's motions to dismiss or stay proceedings in the district court pending the outcome of the proceedings in Dubai. All of the alleged activity cited by Drexel in its petition (Drexel Pet. 10) occurred in connection with the Committee's motions to dismiss or stay.

and assert claims against it for the first time, the Committee raised its FSIA defenses in a proper and timely fashion by filing a motion to dismiss both complaints. Pet. App. 17a.

Despite Petitioners' attempts to ignore and recast these facts, the court below had more than adequate support in the record for its determination that on numerous occasions the Committee acted to assert, or preserve, its FSIA defenses. There is no reason for this Court to review that determination.

B. The Decision Below Is Consistent With The Statute And The Case Law.

The court below made no mistake in applying the law of waiver to the facts before it. The FSIA provides that a foreign state shall not be immune from the jurisdiction of United States courts in any case where the foreign state has waived its immunity "either explicitly or by implication." 28 U.S.C. § 1605(a)(1). Construing this statutory provision and its legislative history, all of the courts that have considered the matter, including the court below, have held that the implied waiver provision of Section 1605(a)(1) must be construed narrowly.[15]

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[15] *Shapiro* v. *Republic of Bolivia*, 930 F.2d 1013, 1017 (2d Cir. 1991) (the waiver must be "unmistakable" and the circumstances "unambiguous"). *Accord Foremost-McKesson Inc.* v. *Islamic Republic of Iran*, 905 F.2d 438, 444 (D.C. Cir. 1990), *on remand*, 759 F. Supp. 855 (D.D.C. 1991) (same); *Frolova* v. *Union of Soviet Socialist Republics*, 761 F.2d 370, 377-78 (7th Cir. 1985) (A waiver cannot be found absent evidence demonstrating a "conscious decision to take part in the litigation and a failure to raise sovereign immunity despite the opportunity to do so"); *Joseph* v. *Office of the Consulate General of Nigeria*, 830 F.2d 1018, 1022 (9th Cir. 1987), *cert. denied*, 485 U.S. 905 (1988) ("narrowly construed"); *Siderman de Blake* v. *Republic of Argentina*, 965 F.2d 699, 720 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1812 (1993) (same); *see also Canadian Overseas Ores Ltd.* v. *Compania De Acero Del Pacifico, S.A.*, 727 F.2d 274, 277 (2d Cir. 1984) (entering into stipulations

Given the language of the statute and the case law interpreting it, it is difficult to credit Petitioners' claim (Refco Pet. 19; Drexel Pet. 9-10) that the decision below contravenes the statute's "plain meaning." The statutory language simply states that a waiver may occur "either explicitly or by implication." 28 U.S.C. § 1605(a)(1). The "plain meaning" of this clause therefore must be determined by application of the terms "explicitly" or "by implication" to the facts. Guided by the numerous court of appeals decisions on this point, the court below applied the language of the statute to the facts before it and reached the proper conclusion.[16]

Petitioners' challenge to the decision of the court of appeals is no more than a reiteration of the arguments, rejected by the court below, that the Committee's actions taken in a representative capacity on behalf of two non-immune defendants amounted to a "general appearance" by "the real party in interest," and that such general appearance constituted a waiver as to jurisdiction over any later-filed and different claims against the Committee itself. This misses the point as to FSIA waiver.

The court of appeals recognized that the Committee's pre-amendment conduct (in seeking comity deference with respect to breach of contract claims against non-immune defendants) could not form the basis of an implied waiver with respect to Petitioners' 1992 claims against the Com-

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waiving certain defenses and extending time to answer prior to assertion of sovereign immunity was not a waiver).

[16] Drexel's argument concerning the "plain meaning" of the statute (Drexel Pet. 9-10) is actually based on language in the legislative history, which, unlike the statute, refers to a situation in which a foreign state *against whom a claim has been asserted* files a responsive pleading without asserting the defense of immunity. H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 17 (1976), *reprinted in* U.S.C.C.A.N. 6604, 6617. The excerpt cited from the legislative history does not refer to the situation here, where a foreign state against whom no claim has been asserted appears in a representative capacity on behalf of non-immune, insolvent parties.

mittee—which claims are based upon *different* conduct occurring at *different* points in time against *different* parties under *different* legal theories. *See Shapiro* v. *Republic of Bolivia*, 930 F.2d 1013, 1017 (2d Cir. 1991) (refusing to find that a foreign sovereign's prior participation in litigation "with respect to a particular matter constitutes a waiver of immunity from jurisdiction as to associated claims.")[17]

As the court of appeals noted, no matter how the Committee's pre-amendment conduct is characterized, "given its understanding of its position," the Committee "consistently invoked FSIA immunity, or reserved the right to do so in the future, to an extent that precludes a determination that FSIA immunity was unambiguously and unmistakably waived." Pet. App. 21a. This conclusion is consistent with the narrow application of the statute and the case law and should not be revisited here.

C. There Is No Conflict Among The Circuits Requiring This Court's Attention.

Petitioner Drexel erroneously claims a conflict "with every federal decision on this issue" (Drexel Pet. at 11), while Refco merely suggests that the decision of the court below on waiver is "at variance" with precedent in the Ninth Circuit. Refco Pet. at 21. However the argument is couched, the decision below creates no conflict among the circuits or even among "federal decisions" on this issue.[18]

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[17] There is no authority for the proposition that a foreign state's participation in litigation for the purpose of seeking a dismissal or stay on the grounds of comity can give rise to an implied waiver. The only authority that has addressed a similar issue reached the contrary conclusion. *Foremost-McKesson, Inc.* v. *Islamic Republic of Iran*, 905 F.2d 438, 445 (D.C. Cir. 1990), *on remand*, 759 F. Supp. 855 (D.D.C. 1991).

[18] One of the "federal" decisions cited by Drexel (Drexel Pet. at 11-12) was decided by a New York state court.

None of the cases cited by Petitioners involved the precise issue presented here (*i.e.*, whether a foreign state appearing in a representative capacity on behalf of non-immune defendants waives its own immunity from suit with respect to future claims). The only allegedly contrary court of appeals decision cited by Petitioners is the Ninth Circuit's decision in *Siderman de Blake* v. *Republc of Argentina*, 965 F.2d 699 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1812 (1993). Refco Pet. at 21; Drexel Pet. at 11. *Siderman*, however, involved only a remand to the district court for further proceedings on the issue of waiver. It suggests, but does not hold, that the *affirmative* use of California courts by a sovereign to further a sovereign's criminal case against the plaintiff might constitute a waiver of immunity in a case brought by the plaintiff against the sovereign. *Id.* at 720. *Siderman* is not applicable to the facts in this case: No affirmative use of the district court was made by the Committee here; its appearance in the Drexel and Refco actions was only to seek comity deference to its own judicial proceedings in Dubai.[19]

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[19] The other lower court cases cited by Petitioners are similarly distinguishable. In *Aboujdid* v. *Singapore Airlines, Ltd.*, 67 N.Y. 2d 450 (1986), the plaintiff asserted claims directly against the foreign sovereign at the outset of its case. Waiver was found because the foreign sovereign answered the claims asserted and asserted a non-mandatory counterclaim against the plaintiffs and others, thus affirmatively using the forum to pursue remedies. There are no such facts present here.

Sea Lift v. *Refinadora Costaricense de Petroleo*, 601 F. Supp. 457, 465 (S.D. Fla. 1984), *rev'd on other grounds*, 792 F.2d 989 (11th Cir. 1986), is distinguishable because the defendant did not raise the sovereign immunity defense until trial. In *Corporacion Venezolana de Fomento* v. *Vintero Sales Corp.*, 477 F. Supp. 615, 620 (S.D.N.Y. 1979), *rev'd on other grounds*, 620 F.2d 786 (2d Cir. 1980), *cert. denied*, 469 U.S. 1087 (1984), a case that began before the FSIA became effective, the sovereign plaintiff argued to the district court, which raised the FSIA issue *sua sponte* after trial, that the FSIA did not apply. These cases provide no support for Petitioners' claims.

District court cases involving choice-of-law clauses, cited by Drexel (Drexel Pet. 13), are similarly irrelevant and raise no conflict among the circuits. In those few cases cited by Drexel that actually support the point argued, foreign sovereigns were held to have waived their immunity defenses by affirmatively entering into agreements that contemplated the application of U.S. law to the interpretation of the agreement at issue.[20] Thus there was present in such cases an affirmative, conscious decision to waive immunity that is not present here.[21]

In short, this case does not present any important issue of statutory construction or conflict among the circuits on the question of FSIA waiver. Nor is there even an important policy question, as Petitioners claim. Refco Pet. 20; Drexel Pet. 14. Construing the waiver exception narrowly is consistent with the restrictive theory of immunity codified in the FSIA. While it is perfectly appropriate for a U.S. court to examine the conduct of foreign

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[20] Of the four cases Drexel cites as examples of the "numerous" court holdings on this point, only two district court cases (*Marlowe* v. *Argentine Naval Com.*, 604 F. Supp. 703 (D.D.C. 1985), and *Resource Dynamics Int'l* v. *General People's Comm.*, 593 F. Supp. 572 (N.D. Ga. 1984)) actually support Drexel's assertion. The holding in *Transamerican S.S. Corp.* v. *Somali Democratic Republic*, 767 F.2d 998 (D.C. Cir. 1985), does not discuss or rely on waiver, which is discussed only in the concurring opinion. And *Ohntrup* v. *Firearms Center, Inc.*, 516 F. Supp. 1281, 1284-85 (E.D. Pa. 1981), *aff'd*, 760 F.2d 259 (3d Cir. 1985), held that there was no waiver on the facts presented.

[21] Cases suggesting the alleged "longstanding well-established principle" (Drexel Pet. 14) that an appearance without asserting jurisdictional defenses is a waiver, are inapposite to a case under the FSIA. The only case Drexel cites for this argument, *Pilgrim Badge & Label Corp.* v. *Barrios*, 857 F.2d 1, 3 (1st Cir. 1988), does not involve either a foreign sovereign or the FSIA. Petitioners cannot imply jurisdiction over a foreign sovereign through application of statutes or case law unrelated to the FSIA. The only source of jurisdiction over a foreign sovereign or an agency or instrumentality of a foreign state is the FSIA. *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989).

proceedings to determine whether comity justifies deferring or giving preclusive effect to the decisions of a foreign tribunal, it would not be appropriate, as a matter of policy, for a party to be permitted to pursue claims against a foreign tribunal in a U.S. court seeking to hold the foreign tribunal liable for its adjudication of creditors' claims in another country. In its refusal to permit such a result, the court of appeals rendered a decision that is fully consistent with the FSIA and its policy of restrictive immunity.

II. THE SECOND CIRCUIT'S DECISION REGARDING THE COMMERCIAL ACTIVITY EXCEPTION OF THE FSIA DOES NOT RAISE ANY IMPORTANT ISSUES REQUIRING REVIEW.

A. The Court Below Properly Applied The Statute.

In *Saudi Arabia* v. *Nelson*, 113 S. Ct. 1471, 1476 (1993), this Court stated: "[A] foreign state is presumptively immune from the jurisdiction of United States courts; unless a specified exception applies, a federal court lacks subject matter jurisdiction over a claim against a foreign state." Of the three "commercial activity" exceptions available under section 1605(a)(2) of the FSIA, only one, the third, is at issue in this case. Thus, there is an exception to the general rule of sovereign immunity in this case only if it is a case

> in which the action is based . . . upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2). By its terms, the third clause of section 1605(a)(2) requires that three conditions be met: the action must be "based upon" (1) an act outside the United States (2) in connection with a commercial activity of the foreign state elsewhere (3) that has a direct effect in the United States. *Id.*

Petitioners contend that, contrary to the "plain meaning" of the statute and in conflict with the decisions of several courts of appeals, the court below misinterpreted and misapplied these requirements of section 1605(a)(2) in two respects: (1) by assertedly holding that the "act outside the territory of the United States" upon which the cause of action is "based" can only be a commercial act (Refco Pet. 14-15, 17; Drexel Pet. 17); and (2) by assertedly holding that the "direct effect" in the United States can only be caused by a commercial activity (Refco Pet. 11, 14; Drexel Pet. 17). Both contentions are wrong; this is not what the court of appeals held. Petitioners misinterpret and misunderstand the decision below.

The court below did not require that the act on which the action is based, the first requirement of clause three, must be commercial in nature. Rather, it held that Petitioners' claims *in this case* are not based on commercial activity. This holding responded directly to arguments made by Petitioners.[22] It also responded to the decision of the district court, which held that the Committee had engaged in "commercial activity" when it marshalled, managed and liquidated Galadari's assets and that such commercial activity had a direct effect in the United States.[23]

The court of appeals rejected Petitioners' and the district court's analysis. Without concluding (and in fact

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[22] Petitioners had argued both in the district court and in the court of appeals that the gravamen of their claims was "commercial activity," thus implicating the first clause of section 1605(a)(2) as well as the third clause. Petitioners appear to have abandoned that argument in this Court and now appear to be relying exclusively on the third clause.

[23] The district court identified these acts as the "relevant acts" on which Petitioners' claims were based (Pet. App. 57a), essentially ignoring the Committee's adjudication. Thus the district court, not the court of appeals, erred by linking the "direct effect" clause with the "commercial activity" requirement.

expressing substantial doubt) that the interim operation pending sale of a business unrelated to commodities trading could constitute "commercial activity" within the meaning of the FSIA, the court below held that the marshalling, managing and liquidating of assets were not the activities "upon which the claims of Drexel and Refco are based" in this case. Pet. App. 24a.[24] In keeping with the requirements of the third clause of section 1605(a)(2) and the recent instruction of this Court in *Nelson* and *Republic of Argentina* v. *Weltover*, 112 S. Ct. 2160 (1992), the court below properly concluded that Petitioners did not assert claims that arose from or were based upon the commercial activity alleged, *i.e.*, from either the continued operation of the UBME (by another government entity, not the Committee) or the alleged interim management of unrelated Galadari businesses by the Committee. Pet. App. 24a.

Proceeding in accord with *Nelson*, the court below identified the "gravamen" of Petitioners' claims as the Committee's "essentially judicial"—and therefore sovereign—role of marshalling the assets of Galadari and Commodities and adjudicating the claims of their creditors. Pet. App. 24a. The court reached its conclusion by looking at the "nature" of the functions performed by the

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[24] The court below termed "suspect" Petitioners' "depiction" of the actions of collecting and liquidating the assets of Galadari and Commodities as commercial, citing decisions of other courts of appeals. Pet. App. 24a n.3. This contradicts Refco's assertion that these activities were "acknowledged" by the court below as commercial. Refco Pet. 15.

The only specific "commercial activity" identified by the district court in its opinion was the interim operation pending sale of a hotel in Singapore. Pet. App. 58a. But this had nothing to do with commodities trading or the adjudication of Petitioners' claims. The only other alleged "commercial activity" identified by Petitioners related to the continued operation of the UBME, a function that in fact was not performed by the Committee, but was left to a specifically created Provisional Board unrelated to the Committee. *See* Decree No. 8, Em. App. 6a-7a.

Committee, as this Court directed in *Weltover*. The court recognized that Decree No. 3 charged the Committee with performing a dual function: as a judicial or quasi-judicial body, adjudicating creditors' claims, and as a liquidator or trustee, marshalling and liquidating assets to be distributed to creditors. Emirate App. 7a-10a. The court correctly found, however, that the "act" upon which the claims of Drexel and Refco were based was "essentially the adverse determination of their claims by the Committee" (Pet. App. 25a), a judicial act in Dubai that under Dubai law is exclusively a governmental function in which private parties may not engage. See Decree No. 3, Em. App. 10a (Committee has immunity from liability for its activities).[25]

Similarly, the court below did not hold, as Petitioners urge (Refco Pet. 11, 14; Drexel Pet. 17), that clause three's "direct effect" in the United States must be caused by commercial activity. Rather, the court examined the alleged commercial acts cited by Petitioners and concluded that they were not acts that "cause[d] a direct effect in the United States, *upon which the claims of Drexel and Refco are based*." Pet. App. 24a (emphasis added). The court below thus linked the "act" on which the cause of action is based with "direct effect[s] in the United States," reading the statute precisely as the Petitioners claim it should be read. Refco Pet. 17; Drexel Pet. 19.

Petitioners' citations to this Court's "observations" (Drexel Pet. 18; Refco Pet. 13) in *Nelson* concerning the distinction between claims "based upon" commercial ac-

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[25] In this Court, Petitioners do not urge a contrary conclusion. Having apparently abandoned the argument that the gravamen of their claims was commercial activity, they now contend that the court below inserted in the statute the requirement of a "commercial" act as the basis of a cause of action. This contention was never presented to the court below, is not based on an accurate reading of the decision below, and therefore is not properly presented to this Court in this case.

tivity (clause one) and those based upon acts "in connection with" commercial activity (clauses two and three) do not dictate any different result from that reached by the court below. The court of appeals held that the "gravamen" of Petitioners' complaints—the adjudication by the Committee of their claims in Dubai—had no more than a tangential or attenuated relation to the alleged commercial activities here (if those activities in fact were commercial). The court of appeals' conclusion that such a tangential or attenuated relationship (between a sovereign act "gravamen" and "suspect" commercial activity) failed to meet the requirements of the FSIA was proper under the statute and the theory of restrictive immunity that it codifies. *See Republic of Argentina* v. *Weltover*, 112 S. Ct. at 2165.[26]

Far from misconstruing the statute, the court below merely held that where a cause of action is not based on a commercial act, as is true here, the connection between the non-commercial act and the "commercial activities elsewhere" must be stronger than is present here. Otherwise the exception to immunity would swallow the rule. Pet. App. 25a. The decision below is fully consistent with the language of the statute, the restrictive theory of immunity and the prior decisions of this Court.[27]

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[26] Petitioners' citation to *Weltover* (Drexel Pet. 18; Refco Pet. 13) fails to provide any support for their claims. Contrary to Petitioners' assertions, this Court did not hold that the act upon which the cause of action was based in *Weltover*, the rescheduling of interest payments, was "sovereign," as was confirmed in *Nelson. Saudi Arabia* v. *Nelson*, 113 S.Ct. at 1479.

[27] To accept Petitioners' interpretation of clause three would in effect place every bankruptcy court outside the United States at risk of being hauled into U.S. courts by disgruntled creditors to face liability for their adjudicative acts. This is not the meaning or the purpose of the FSIA.

B. The Decision Below Does Not Conflict With The Decisions Of Other Circuits.

Petitioners' claim that there is a "split" (Drexel Pet. 20) or a "difference" (Refco Pet. 18) among the circuits regarding the proper interpretation of clause three of the commercial activities exception is plainly wrong for two reasons. It is based on Petitioners' misreading of the opinion below, and it is based on a misreading of the decisions of the Third, Fifth, Ninth and Eleventh Circuits.

In *Federal Insurance Co.* v. *Richard I. Rubin & Co.*, 12 F.3d 1270 (3d Cir. 1993), the Third Circuit found there was not a sufficient nexus within the meaning of *Nelson* between the "tort-like" claims for personal injury and the commercial "act outside the territory of the United States," a loan transaction. *Id.* at 1291. The Third Circuit therefore found that the tort cause of action was not "based upon" the commercial act. *Id.* The decision in *Federal* is consistent with the decision of the court of appeals here.

In *Vermeulen* v. *Renault, U.S.A.*, 985 F.2d 1534, 1544-45 (11th Cir. 1993), the Eleventh Circuit simply held that there is jurisdiction in U.S. courts over personal injury claims "based on" the "act" of designing and manufacturing automobiles "outside the territory of the United States" in connection with the "commercial activity" of selling cars worldwide. In *Vermeulen*, the "act" with "direct effects" was a commercial act. There is no conflict between *Vermeulen* and this case.

Similarly, in *Siderman*, 965 F.2d at 710, there was no contention that the "act" upon which the action was based —operating a business in Argentina—was anything but commercial. And Refco's citation to *Stena Rederi AB* v. *Comision de Contratos Del Comite*, 923 F.2d 380, 386 (5th Cir. 1991), only refers to a restatement of the statutory criteria: *Stena* does not address any clause three issue relevant to this case, although it holds that under

clause two there must be a "material" connection between the act on which the claim is based and the commercial activity to which it relates. *Id.* at 388.

Given the complete lack of evidence of any conflict between the decision below and other circuit court decisions, there is no basis for review by this Court.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDICES

APPENDIX A

§ 1603. Definitions

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

§ 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state

and that agency or instrumentality is engaged in a commercial activity in the United States;

* * *

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights;

* * *

APPENDIX B

IN THE MATTER OF THE COMMITTEE OF RECEIVERS
APPOINTED BY EMIRI DECREE NO. 3 OF 1984
CONCERNING THE FINANCIAL AFFAIRS OF
ABDUL WAHAB EBRAHAM GALADARI

and

IN THE MATTER OF THE CLAIMS OF
THE DREXEL BURNHAM LAMBERT GROUP INC.,
and REFCO INC.

DECISION

By a Formal Proof of the Debt Claim Form received by the Committee of Receivers of Abdul Wahab Galadari, appointed pursuant to Decree No. (3) 1984 of the Emirate of Dubai ("The Decree") on the 29th of July 1984, the Drexel Burnham Lambert Group Inc. ("Drexel") have claimed to be a secured creditor in the receivership constituted by the Decree in respect of an amount of US$ 12,740,129.53 (as at the 17th of April 1984). The particulars of the security claimed to be held is set out in the Proof of Debt Form, namely 6,068,640 Class B shares of Union Bank of the Middle East Ltd ("UBME") represented by share certificates numbers B7 and B10. The Proof of Debt Form was accompanied by, inter alia, a Promissory Note dated 14th September 1982 ("the Promissory Note") and executed by Abdul Wahab Galadari ("Galadari") in his personal capacity and also by Galadari on behalf of A.W. Galadari Commodities ("Commodities") as a partner thereof, pursuant to which Galadari and Commodities promised to pay the sum of US$ 19,465,000 together with interest thereon over any balance from time to time outstanding, at the rate of 13¾% per annum to Drexel Burnham Lambert International B.V. ("Drexel International"). The Promissory

Note evidenced a debit balance in the commodity trading account of Commodities. Drexel is claiming as assignee of the Promissory Note.

It is not clear from the Proof of Debt or Claim Form which of the Galadari Companies (as defined in the Decree) Drexel were claiming to be creditors of or whether Drexel were claiming as creditors of Galadari personally. There is nowhere on the Form for the debtor or debtor company to be named.

However, as of the date of the receipt of the Proof of Debt Form, the Committee considered that Drexel were claiming to be creditors of both Galadari and Commodities as these were the signatories to the Promissory Note.

It was not until June 20, 1986 that Drexel, for the first time, claimed that Commodities was a division of A.W. Galadari Holdings (Pvt) Limited ("Holdings") as described in the consolidated financial statements of Holdings and its subsidiaries for the year ended 31st March 1982 and as such that Drexel should be treated as a creditor of Holdings.

Pursuant to the terms of the Decree it is incumbent upon the Committee to determine the various issues raised with regard to Drexel's claim, in particular (i) whether Drexel's claim to rank as a creditor of Holdings was timely; (ii) whether Drexel's claim should be admitted in whole or part; (iii) whether Drexel's claim should be admitted in the receivership as a debt of Commodities and Galadari only, or whether Drexel should properly rank as a creditor of Holdings on the grounds that Commodities was at the relevant time a wholly or partially owned unincorporated business or "Division" of Holdings; and, (iv) whether Drexel holds or held a valid security over 6,068,640 shares of Class B stock of UBME or the proceeds thereof.

A Formal Proof of Debt or Claim Form has also been submitted to the Committee by Refco Inc ("Refco") un-

der cover of a letter from Refco dated July 16th 1984. Refco claims to be a creditor in the receivership in the sum of US$ 4,609,664.20. This amount is claimed by Refco to be the debit balance in the commodity trading account of Commodities with Refco. As with the Drexel Proof of Debt or Claim Form, it is not clear which of the Galadari Companies Refco were claiming to be creditors of. However, the Form was accompanied by an Appendix which advised that Refco held a letter dated July 6, 1983 signed by Galadari personally and as Chairman of Commodities in which, (i) a total debt of US$ 6,109,664.20 was acknowledged as due to Refco; (ii) Galadari confirmed that he personally was responsible for the repayment of US$ 3,000,000 of the balance outstanding; and (iii) that Commodities owed the balance of US$ 3,109,-664.20. The Committee were advised by Refco that Galadari had paid US$ 1,500,000 to Refco in respect of his personal liability. Refco claim to be a creditor of Holdings for the full amount claimed. The Committee must therefore determine (i) whether Refco's claim to rank as a creditor of Holdings was timely; (ii) whether Refco's claim should be admitted in whole or in part; and (iii) whether Refco's claim should be admitted in the receivership as a debt of Commodities and Galadari only, or whether Refco should properly rank as a creditor of Holdings.

In determining the various issues before it the Committee has been very conscious of the fact that it was appointed by the Decree of a sovereign state and that it must exercise its functions judicially. In doing so it has been acutely aware of the obligations to ensure that Drexel and Refco are treated fairly in the proceedings which they have brought before the Committee and are accorded every opportunity to ensure that all evidence concerning their claims are brought to the attention of the Committee. In conducting these proceedings the Committee has adopted an inquisitorial approach. The proceedings are not, and never have been adversarial in nature. How-

ever, in the process the Committee has also been fully aware of its obligations to the general body of creditors in the receivership to ensure that any claim, by any potential creditor, is only admitted after full investigation of the facts. In fulfilling this duty the Committee has been assisted by Mr. Carl Asher, then of Messrs Gaston & Snow and now of Messrs Bickel & Brewer, as counsel to the Committee to assist the Committee by putting forward an objective view of the evidence presented to the Committee by Drexel and also to put before the Committee evidence contrary to Drexel's position, in order for the Committee to properly fulfill its duty to the general body of creditors, that is, only admit claims against any particular Galadari Company which the Committee is satisfied after a full investigation of the facts is a proper debt of that particular Galadari Company. Mr. Asher and his firm had previously acted in certain proceedings in New York brought by Drexel against Galadari and Commodities, prior to the involvement of the Committee in those proceedings. The Committee considers that Mr. Asher, in fulfilling that role, has at all times acted in good faith towards Drexel.

Following upon the representations of Drexel made in meetings before the Committee on the 4th and 6th of February 1989, the Committee restricted the role of Mr. Asher and his firm in the Dubai proceedings. However, the Committee recognised the necessity to have some assistance from lawyers in fulfilling their judicial role and appointed Richards Butler as their independent confidential advisors. Richards Butler had not previously been involved in any way in the conduct of the receivership nor have they put before the Committee any evidence and have not acted in any adversarial capacity in any manner before the Committee. Since February 1989 neither the Committee nor its advisors has taken any advice on the evidence before it in these proceedings from Mr. Asher nor has the Committee or its advisors discussed any of the evidence with Mr. Asher. Mr. Asher has not been

involved in the Committee's decision making process although the Committee has adopted certain of the findings submitted by Mr. Asher in the course of 1987 when they had been of the opinion that such findings are supported by the evidence in the record.

Subsequent to the appointment of Richards Butler, and upon their advice, the Committee took the decision to appoint an independent firm of accountants, Spicer & Oppenheim (now know as Touche Ross & Co. but referred to in this decision as "Spicer & Oppenheim") to opine upon the accounting issues that arose in the matter. The Committee took this step as it considered that it would be failing in its duty to the general body of creditors in the receivership if it did not obtain the opinion of an independent accountant, the only accounting opinion in the record before them at that time being that of Price Waterhouse submitted by Drexel. Indeed, at the hearing before the Committee on the 6th of February 1989 Drexel's counsel invited the Committee to obtain such an opinion.

At no time did the Committee or Richards Butler on behalf of the Committee give any instructions to Spicer & Oppenheim concerning any conclusion that they should reach. The Committee has considered the representations made by counsel to Refco in their letter to the Committee dated 22nd of February 1991. Mr. Holden, the author of the Spicer & Oppenheim report was cross examined by counsel to Drexel for four-and-a-half days in December 1990. The Committee is satisfied that the report is independent. Any changes to the drafts of the report resulting from any representations made by Richards Butler did not in any way change the substance of the report. Furthermore, Mr. Holden consistently testified that the conclusions reached were reached independently and entriely on his own. He further testified that at no time did Richards Butler ever express any opinion on the subject of his report to him. The Committee has no reason to

doubt the integrity of Mr. Holden nor it would appear do Drexel doubt his integrity as has been stated by Drexel's counsel on the record. Therefore, the Committee finds that the Spicer & Oppenheim report is independent and will give it such weight as it considers appropriate in reaching its conclusions. Furthermore, the Committee does not consider Refco have been denied due process in respect of the Committee's decision not to allow them to cross-examine the author of the Spicer & Oppenheim report. Throughout these proceedings Refco have been content to permit Drexel to put the case to the Committee that at the relevant time Commodities was a "division" of Holdings. Refco have not requested that they be permitted to cross-examine any other witnesses relevant to the issue. The Committee considered that in such circumstances Refco should only participate as an observer in the cross-examination, which they did. In the event the cross-examination conducted by Drexel's counsel was extremely thorough, taking as it did some four-and-a-half days.

The Committee also notes that counsel to Drexel gave notice on a number of occasions at the cross examination of Drexel's intention to place a motion before the Committee that the report should be struck from the record no such motion has been made.

Professor Richard Speidel was also appointed by the Committee pursuant to Article 7(k) of the Decree to give a legal opinion on the question of Drexel's claim to a security interest. Drexel has requested permission to conduct cross-examination of Professor Speidel through oral questions to which he would provide oral answers. The Committee has permitted Drexel to conduct cross-examination of Professor Speidel through written questions to which Professor Speidel would provide written answers. The Committee, while recognizing the importance of cross-examination by oral questions posed to witnesses of fact, do not believe that such mode of con-

ducting cross-examination is particularly useful in respect of examination of an expert witness regarding opinions of law, whose evidence relates to legal theories and conclusions, necessarily depending upon the research of various topics. Furthermore, Drexel has failed to avail itself of the opportunity to cross-examine Professor Speidel through means of written questions and answers. Moreover, Drexel has failed to advance any reason why oral questions and answers are superior to written questions in respect of examining Professor Speidel with regard to the opinions he has proffered. The Committee observes that Drexel has failed to submit evidence from any American legal scholar of Professor Speidel's stature in opposition to his opinion.

Both Drexel and Refco have made a number of submissions to the Committee alledging that they have been denied due process in these proceedings. The Committee does not consider that either Drexel or Refco have been denied any due process to which they are entitled. However, if either Drexel or Refco are not satisfied that they have been given a full and fair hearing on all issues raised by them in the proceedings then their proper remedy is to raise these matters before the Judicial Committee appointed under the Decree.

There have also been a very large number of applications by Drexel during the long and complicated course of these proceedings. The Committee have given full and fair consideration to all these applications which has had the effect of lengthening even further the proceedings.

A. *Drexel's Claim*

1) Was Drexel's claim against Holdings timely?

Clause 7 (d) of the Decree provides that the Committee shall have power:

> "To require creditors to submit claims in such form or accompanied by such proofs, and

within such period as the Committee shall determine;"

The Committee initially invited creditors to submit completed Proofs of Debt or Claim Forms to them by the 31st of July 1984. Advertisements were placed in both the Arab and English press in Dubai. Furthermore, creditors identified on the books of any of the Galadari Companies were circularised with a standard letter from the relevant Galadari Company advising them that claims should be admitted by 31st July 1984 and inviting them to complete the Proof of Debt or Claim Form which was enclosed and return it to the Committee by that date.

Drexel submitted a Proof of Debt or Claim Form which was received by the Committee on the 29th of July 1984. Whilst this Form did not specify the debtor company from whom Drexel were claiming it was treated by the Committee as a claim against Galadari and Commodities as these were the signatories to the Promissory Note upon which Drexel relied, which was attached and the debt was recorded on the books of Commodities maintained in the receivership as a debt of Commodities.

The claim by Drexel to be a creditor of Holdings was made for the first time in June 1986, shortly after the first distribution to the creditors of Holdings and other Galadari Companies. This was outside the period set by the Committee for the submission of claims. Drexel has argued that its claim against Holdings is timely because nowhere in the Proof of Debt or Claim Form, submitted by Drexel in July 1984, is a creditor required to specify the Galadari company it is claiming against. Therefore Drexel did not do so. It has been submitted by Drexel that there is nothing on the face of the Proof of Claim Form which would give a creditor, who later came to believe that its claim involved the assets of an-

other Galadari Company, which in this case is Holdings, any reason to believe that the original Proof of Claim Form is inadequate.

Drexel has further argued that even if they were required to submit a Proof of Debt or Claim Form against Holdings in order to rank as a creditor of Holdings they met this requirement because in the Proof of Debt Form Drexel advised the Committee that they were asserting a claim against the assets of Holdings by asserting a security claim to the shares of UBME owned by Holdings and proportionally pledged to Drexel.

The Committee does acknowledge that the Proof of Debt or Claim Form received by the Committee on the 29th of July 1984 is not conclusive as to the Galadari Company from whom Drexel is claiming to be a creditor and finds that Drexel's claim to be a creditor of Holdings was timely made.

2) Should Drexel's claim be admitted in whole or in part for the purposes of the receivership?

Drexel have submitted a claim in the receivership of US$ 12,740,129.53 (as at 17th April 1984). This figure is based on a principal amount outstanding under the Promissory Note of US$ 12,465,000. Drexel claim this amount together with interest pursuant to the Promissory Note from 1st February 1984. The sum of US$ 12,465,000 represented the debit balance in the commodity trading account of Commodities with Drexel International N.V. as at 14th September 1982 of US$ 19,465,000 as reduced by payments under the Promissory Note during 1982 and 1983.

In November 1987 following upon a suggestion by Drexel and agreed by the Committee, and at the expense of Drexel the Committee appointed Mr. Ronald H. Filler to conduct an investigation and pro-

vide them with a written non-binding report, with respect to the circumstances surrounding the commodity trading activity in the account of Commodities with Drexel International that accrued prior to the delivery of the Promissory Note on 14th September 1982. Mr. Filler found no evidence of actions by Drexel International inconsistent with the reasonable and practical management of the 10500 Account maintained by Commodities when measured against what he considered to be the industry standards existing at the time.

The Committee further requested Mr. Filler to review and provide a further report on certain proprietary trading accounts of Drexel and its affiliates, to determine to what extent, if at all, these accounts traded gold futures contracts, gold bullion and other metals in a manner or pattern inconsistent with the trading activities of Commodities' Account No. 10500 which could constitute a violation of the United States Commodity Exchange Act or any regulations made pursuant to the Act. This report was delivered to the Committee in November 1989 and Mr. Filler found no pattern of trading in the accounts to require him to conclude that Drexel improperly traded any accounts against the accounts of Commodities during the period from August 1982 through September 1982.

In the absence of evidence in the record that Drexel acted improperly in either the closing of the 10500 Account in September 1982 or the operation of 10512 Account opened by Commodities in September 1982, the Committee accepts Mr. Filler's conclusions reached in his two reports regarding Drexel's actions concerning both the accounts of Commodities with Drexel International being the 10500 Account and the 10512 Account and, for the purposes of the receivership and for the distribution of dividends only, concludes that Drexel's claim in

the receivership should be admitted in the amount claimed being a principal sum of US$ 12,465,000 plus interest pursuant to the Promissory Note from 1st February 1984 to 29th July 1984 being the date of the submission of the claim in the receivership and thereafter at a simple rate of interest of 9% per annum on the principal sum in accordance with Dubai law on interest on claims.

3) Has Drexel a valid claim against Holdings?

Drexel contends that at certain relevant times Commodities was a wholly owned division or unincorporated business of Holdings or a partnership in which Holdings was a general partner. This has become known in these proceedings as the Commodities/ Holdings issue.

A great deal of evidence had been provided to the Committee concerning this issue including expert legal opinions from Freshfields, Simmons & Simmons, A.R. Hilal & Associates, Samir Saleh & Associates, Ja'afar Alwan & Associates and Ronald H. Filler. The Committee has also been provided with expert accounting opinions from Price Waterhouse and Spicer & Oppenheim. The Committee was also provided with an expert accounting opinion from Peat Marwick dated 20th October 1986. However, following submissions made on behalf of Drexel the Committee concluded it would not place any reliance on this opinion in reaching its conclusions and it has not done so.

Drexel has examined the various experts who submitted reports to the Committee and a record of these examinations forms part of the record before the Committee. Drexel have also examined various individuals before the Committee in Dubai at meetings of the Committee held on February 21st, 22nd, 23rd, 25th, 1987, April 5th 1987 and February 4th and 6th 1989. Furthermore, the Special Advisor ap-

pointed by the Committee, Mr. Filler, conducted interviews in both London and New York of various individuals which touched upon the Commodities/ Holdings issue. Drexel was present at these interviews. Interviews of all witnesses both before the Committee and before Mr. Filler have been transcribed and the records of these interviews are in evidence before the Committee. In addition the Committee has been provided with proposed findings relating to the Commodities/Holdings issue from both Drexel and counsel to the Committee, Mr. Asher. There are also many hundreds of pages of exhibits relating to this issue in the record. Thus, a voluminous record concerning the Commodities/ Holdings issue has been provided to the Committee for their consideration in reaching their conclusions.

It is not entirely clear from the evidence exactly when Commodities was formed. However, it would appear that it was formed some time in June 1980 as this was when an account, opened in the name of A.W. Galadari Commodities with UBME, received an initial cash deposit of Dhs 294,388.50. In any event Commodities commenced trading when a brokerage account was opened with Drexel International, a subsidiary of Drexel, in November 1980.

There is evidence that Commodities was formed in 1980 as a general partnership between Galadari and Mohammed Bashir with Galadari holding an 80% ownership interest. However, no written partnership agreement exists and Mr. Bashir has denied in testimony before the Committee that he was a partner in Commodities.

According to Mr. Bashir, he was asked to assist Galadari in Commodities on the understanding that if it made a profit, he would share in 20% of the profits. However, he said he would not be responsible for any of the losses of Commodities and that he was,

therefore, not a partner in the business. However, the audited financial statements of Commodities as at 31st March 1981 and 31st March 1982 were drawn up on the basis that Commodities was a partnership and the internal books of account indicate it was a partnership between Galadari and Mr. Bashir. Mr. Bashir also received a proportion of profits paid to him in March 1982 when US$ 2,000,000 of profit was distributed, US$ 1,600,000 being paid to Galadari and US$ 400,000 to Mr. Bashir.

We conclude, that on the basis of the record when considered as a whole on this issue, Commodities was, at all material times a partnership between Galadari and Mr. Mohammed Bashir with 80% being owned by Galadari and 20% by Mr. Bashir.

Drexel contends that, regardless of whether Commodities was formed as a partnership or was directly owned by Galadari as a sole proprietorship Galadari assigned his 80% or 100% interest in Commodities to Holdings at some stage prior to the 31st of March 1982.

The Committee has been presented with certain documentary evidence that Drexel argues supports the inference of such assignment or transfer and its acceptance by Holdings. The Holdings' books of account document the receipt from Galadari of funds originally emanating from Commodities, which funds were received and accounted for as income to Holdings. The Holdings accounts audited by Peat Marwick Taseer Hadi & Co. ("PMTH") for the year ending 31st of March 1982 which described Commodities as a "division" of Holdings and which purport to reflect the taking of Commodities' net income as profit to Holdings was signed by the Managing Director and Chairman of Holdings and formally approved by Holdings' Board.

On or about the 6th of March 1982, Galadari endorsed two Holdings' cheques in the amount of US$ 1,980,000 which he had received from Commodities the previous day. These cheques represented Galadari's individual share of the profits of Commodities for its financial year then ending, 31st March 1982, together with a periodic payment of the commissions due to him as a broker with Commodities. These funds, represented by the cheques made payable to Galadari were recorded as income of Holdings.

In a letter dated 23rd March 1982 PMTH wrote to Mr. Gary Botha, a Holdings Director, stating that during a meeting with Mr. T.M. Hameed and Mr. R. Dhedi the previous day, Mr. Dhedi told PMTH that Commodities "would form part of the consolidated financial statements of A.W. Galadari Holdings with effect from the year ending 31st March 1982." At the time the letter was written Mr. Dhedi was Holdings' Group Financial Services Manager and Mr. Hameed was Holdings' Chief Accountant. The letter further stated that it was the understanding of PMTH that they would be provided with audited financial statements of Commodities.

As promised, during the course of PMTH's examination of Holdings' books in the preparation of the audited financial statements for the year ending 31st March 1982, the audit partner in charge, Mr. Khurshid Hadi, was given access to a copy of the Commodities' financial statements for the period ending 31st March 1982 audited by Ernst & Whinney and dated 31st May 1982.

The PMTH audit report for Holdings for the year ending 31st March 1982 was issued on 9th November 1982. The notes to the Holdings' audit report describe Commodities as a "division" of Holdings in note 5 (e) (ii) and again note 23.

PMTH working papers for the audit also described Commodities as a division of Holdings. No evidence was presented to the Committee that Commodities was ever an incorporated entity or thus a subsidiary of Holdings.

The consolidated profit for the year as reported by the Holdings' Board of Directors in the 1982 audit, included Dhs 10,800,633 in respect of Commodities. This figure represented the entire net income of Commodities for the period ending 31st March 1982 shown by Commodities' audited accounts as US$ 2,919,090 and converted at Dhs 3.7 = US$ 1.

In the consolidated balance sheet of Holdings for the year ended 31st March 1982 the purported investment in, or equity of Commodities is shown as Dhs 3,918,359. This comprises the entire equity of Commodities at 31st March 1982 including undrawn profits which is shown in Commodities audited accounts as US$ 1,059,016 again converted at Dhs 3.7 = US$ 1.

The consolidated accounts of Holdings at 31st March 1982 were signed by Galadari, Chairman of Holdings and Mr. Sami, the Managing Director of Holdings and were approved by the Holdings' Board of Directors.

Article 65 of the Articles of Association of Holdings states that every balance sheet and profit and loss account of Holdings "give a true and fair view of the state of affairs of the company and its profit and loss." Article 66 of the Articles of Association of Holdings states that every balance sheet be signed by at least two directors, "one of whom shall be the Chairman of the company . . .".

Drexel relies on other evidence in support of their contention that there was an assignment of Galadari's

ownership interest in Commodities. This additional evidence is discussed below:

a) Holdings' Board Minutes for meetings held on 19th December 1981, 7th April 1982 and 6th July 1982 which make reference to Commodities.

i) In the Minutes of 19th December 1981, item 6 in the Minutes states as follows:

"Consolidation of Accounts

GN, ESI and AWG Comm. shall be consolidated for accounting purposes with the rest of the Group."

This Minute first appeared in the record as an exhibit to the Spicer & Oppenheim report and has been adopted by Drexel as further documentary support of their contention in Price Waterhouse's letter of 19th February 1991.

ii) In the Minutes of the 7th of April 1982 it is reported under the heading "Budget 1982/1983 Company Operation" in item 2 (vii) that Dhs 20 million was budgeted for Galadari Commodities.

iii) In the Minutes of the meeting held on 6th July 1982 it is stated that the "year's profit target fixed by the Board of Directors" for the listed "Companies/Divisions" includes a target of Dhs 20,000,000 for "AW Galadari Commodities".

b) In their working papers for the 1982 audit of Holdings, PMTH set forth an "extract" from a Holdings Board Minute which listed the monthly dividends that would be paid to Holdings by various of its entities including Commodities.

c) The capital accounts of the Commodities' "partners" totalled US$ 1,059,016 as of 31st March 1982 and this amount remained unchanged after that date. As of 28th February 1983 there was no change in the "partners' equity" accounts from 31st March 1982. The Commodities' monthly accounts for the period ending 29th February 1984 again shows "partners' equity" of US$ 1,059,017. Drexel argues that the relative inactivity of the capital accounts from 31st March 1982 onwards is further evidence of an assignment by Galadari of Commodities to Holdings effective from that date.

d) In a letter dated 11th August 1981 from Dennis Mandody, the General Manager of Commodities to the UAE Central Bank a response is enclosed to a Central Bank request for information. The letter states under the heading "Ownership and Direction" that Commodities is owned 80% by "Abdul Wahab Galadari, A.W. Galadari Holdings, P.O. Box 22, Dubai, U.A.E. and 20% by Mohammed Bashir, Mohammed Bashir & Sons, P.O. Box 689, Dubai, U.A.E.

e) In a letter dated 28th March 1983 from Mr. Robert Hughes of Ernst & Whinney to Commodities he confirmed that "we were informed . . . that Mr. Galadari has decided that AW Galadari Commodities should not be considered part of AW Galadari Holdings Group so that it is therefore not subject to the Group's reporting requirements and it is also intended to be decided that there should be no audit of the 1983 accounts." Drexel argues that the implication of this letter is that at least up to that time Commodities was considered part of Holdings. However, it is significant that Mr. Hughes, the partner at Ernst & Whinney in charge of the

audit of Commodities, and who gave evidence in the proceedings has denied he had any such information or intention at the time that he wrote that letter. Mr. Hughes has testified that he understood from discussions that he and his staff had conducted in or about May 1982 with Galadari and other members of Commodities' management, that Commodities was a partnership owned by Galadari and Mr. Bashir in the proportion of 80% and 20%.

f) A memo from Mr. Bashir to Mr. Mandody and Mr. Khan, both employees of Commodities, dated 30th August 1983. Mr. Bashir reports adjustments in salaries of certain Commodities staff made "with the consent and approval of Mr. A.W. Galadari, Chairman." Drexel submit that the reference to Mr. Galadari as "Chairman" makes no sense except in the context of his chairmanship in Holdings.

The Committee also has before it in evidence documentation which is not consistent with Galadari having assigned his interest in Commodities to Holdings. This documentation includes:

i) The books of Commodities which reflect a payment out to Galadari of US$ 1,600,-000 on 5th March 1982. This was transferred by Galadari to Holdings. Mr. Hughes has stated in his evidence that Galadari, when asked (by Mr. Hughes) if this meant he was acting as a nominee of Holdings, Galadari replied he was not;

ii) The trade licences for Commodities issued by the Dubai Municipality for the years 14th June 1981 to 13th June 1982, 14th June 1982 to 13th June 1983 and 14th June 1983 to 13th June 1984. These li-

cences do not reflect any change in the ownership of Commodities. All the certificates show the licensee to be Abdul Wahab Kildari (sic).

iii) The Promissory Note acknowledging Galadari Commodities' debt to Drexel was signed on 14th September 1982. The signatories on the Note are Galadari personally and Galadari as "partner" of Commodities.

iv) The "Partnership Account" form of Drexel International signed on 14th September 1982 is signed by Galadari on behalf of Commodities and certifies that "A.W. Galadari" is the only member of the partnership.

v) A draft report prepared by PMTH for UBME on the financial position of Holdings and dated 5th March 1983 is contradictory within itself and indicates that PMTH were not sure of the status of Commodities. Commodities is listed under the list headed "Group Companies" and is stated to be 100% held by the Group. However later in the document Commodities is referred to as being owned "personally" by Galadari.

vi) In a letter to the Financial Surveillance Officer of the London International Futures Exchange Limited from Dennis Mandody the General Manager of Commodities and dated 6th September 1983 it is stated "A.W. Galadari Commodities is a sole proprietorship of Abdul Wahab Galadari. In order to comply with the "Declarations" for non-clearing members of LIFFE, we

declare that the personal net worth of Mr. A.W. Galadari is in excess of GBP 100,000/-."

The Committee also heard the testimony of two former Holdings directors, Mr. Zubair and Mr. Sami and one former Holdings employee, Mr. Hameed, regarding their understanding of the relationship between Holdings and Commodities,

a) All three witnesses testified that according to their understanding Holdings did not own Commodities. These officials based their testimony primarily upon their direct experience in the overall and day-to-day business affairs of Holdings with which they were intimately familiar. The Committee accepts their evidence that neither Holdings nor its management had financial or management control over the business or operations of Commodities at any time.

b) Furthermore, Mr. Zubair, another former director of Holdings testified that he had been informed by both Galadari and Mr. Bashir that Commodities was a partnership owned by Galadari and Mr. Bashir and that Commodities was a separate company from the other companies in which Galadari held an interest. Mr. Zubair also confirmed that none of the Galadari Holdings' directors knew anything about Commodities and stated that Holdings had "no involvement; absolutely no involvement."

c) Mr. Hameed the Chief Accountant for Holdings, testified that it was his understanding that Holdings did not own Commodities and that he could not explain why Commodities was described as a division of Holdings in its 31st March 1982 accounts.

d) The Committee does not accept Drexel's argument that the question of Commodities' ownership should be totally divorced from consideration of Holdings' involvement in the operation of Commodities. However, the Committee believes it should not place great weight on testimony, even from directors of Holdings, which is based strictly upon consideration of Holdings' involvement or lack thereof in the operation of a particular Galadari business.

In addition Drexel argues that the former Holdings Board members actually confirmed that an assignment took place. Drexel relies on the following testimony:

a) Mr. Sami testified that the inclusion of Commodities in the 31st March 1982 Holdings accounts was a "misstatement" apparently done to "dress up the balance sheet."

b) Mr. Sami acknowledged that "anything that related to the Holdings would normally be brought up to the (Holdings) Board if it required the Board's approval or it was important enough for the Board to consider" and admitted that Commodities was discussed at Holdings' Board meetings and where the Board was advised by Galadari that Commodities was "supplying cash or supplying liquidity" to Holdings.

c) Moreover, Mr. Sami also acknowledged that if Galadari had assigned his interest in Commodities to Holdings and transferred income of Commodities in cash to Holdings it would have been entirely proper to treat Commodities as owned by or as part of Holdings in the audit of accounts. Of course, this testimony begs the question, which essentially relates to whether Galadari did in fact and in law, assign an own-

ership interest in Commodities to Holdings at or before the relevant time and whether in connection with such assignment or otherwise Holdings assumed the future liabilities of Commodities.

d) Mr. Zubair testified that although Commodities was started by Galadari as a partnership "thereafter later on when he started consolidating Group accounts and things like that, like many other assets he assigned a lot of things to Holdings, and one is the Commodities' shares".

The Committee does not accept that the testimony of Mr. Sami and Mr. Zubair, when taken as a whole, provides evidence that an assignment of Galadari's interest in Commodities to Holdings took place.

The Committee finds, having heard and considered the testimony of Mr. Zubair in its entirety, that this testimony when fully considered indicates that Mr. Zubair did not consider that Galadari had assigned his ownership interest in Commodities to Holdings, but rather that he had assigned the profits only of Commodities to Holdings. Mr. Zubair further gave evidence which the Committee accepts that the board of Holdings was totally against Holdings becoming involved in the commodity business, and that the board considered that a "commodity company should not be in the group where there is a bank in the group," and that Galadari was informed of this.

The Committee similarly does not accept that Mr. Sami's evidence confirms that an assignment of Galadari's ownership interest in Holdings took place. Mr. Sami, was from April 1982, managing director of Holdings as well as, at the same time managing director of UBME. The Committee accepts his evidence that he considered the inclusion of Commodi-

ties in the Holdings' consolidated financial statements of 31st March 1981 was a mistake or as he says a "misstatement". The Committee also accepts his evidence that the transfer of Galadari's interest in Commodities was never discussed at meetings of the board of directors of Holdings and that the only mention that he could recall of Commodities at such meetings was that Galaradi named Commodities as "supplying cash or supplying liquidity to the group."

The Committee concludes that the testimony of Mr. Sami, and Mr. Zubair does not land support to Drexel's conclusion that an assignment of Galadari's ownership interest in Commodities was made to Holdings.

There is no evidence before the Committee that Drexel, in extending credit to and conducting business with Commodities ever relied upon any express or implied representation by Holdings that Holdings either owned or controlled Commodities nor is there any evidence that Galadari on behalf of Holdings ever represented this to be the case. Mr. Van Till, an employee at the relevant time of Drexel International and one of the Drexel employees primarily responsible for the Commodities account and who was personally involved in opening the account of Commodities, testified that he believed Commodities was a partnership between Galadari personally and Mr. Bashir. The Committee finds that no such representations were given.

The Committee has also had the advantage of having before it the testimony of two accountants who were involved in the audits for Holdings and Commodities for the financial year 31st March 1982.

Mr. Vijay Malhotra testified before the Committee in Dubai. He was the second audit partner employed in the audit of Holdings at PMTH. Drexel relies on his evidence that Commodities was either

a subsidiary or division of Holdings. However, the Committee considers that little weight can be placed on the evidence as it was not based on any personal knowledge and indeed, PMTH had not, according to Mr. Malhotra, conducted an investigation into the ownership of Commodities because the amounts involved, in the opinion of the audit partners at PMTH, were not significant to the consolidated financial statements as a whole.

Mr. Hughes, the partner in charge of the audit of Commodities gave evidence before Mr. Filler. He testified that in May 1982 Galadari had confirmed to him that Commodities was a partnership between himself and Mr. Bashir, and that, at no time did he, Mr. Hughes, believe that Commodities was a part of Holdings.

The international accounting firm of Price Waterhouse reviewed the transcripts and documents presented to the Committee regarding this question. By a letter dated 21st April 1987, Price Waterhouse reported to the Committee that the accounts of Holdings at 31st March 1982 were wholly consistent with Galadari having assigned his interest in Commodities to Holdings and that the accounts "could not be interpreted in any other way." They further concluded that on the basis of all the evidence on this issue "it is difficult to see how Commodities could have been described in the accounts of Holdings other than as a division or an unincorporated division."

In a further letter to the Committee dated 19th February 1991, Price Waterhouse responded on behalf of Drexel to the Spicer & Oppenheim report dated 21st June 1990 and the subsequent cross-examination of the author of that report Mr. Holden in December 1990. In this opinion Price Waterhouse state that the evidence available "requires the conclusion

that A.W. Galadari assigned his ownership interest in Commodities to Holdings." They go on to say that "in their opinion it is not possible to reach a definitive conclusion as to the ownership of Commodities without taking legal considerations into account." Price Waterhouse are also of the opinion that the minute of 19th December 1981 of the board of Holdings, the extracts in evidence of the books and records of both Commodities and Holdings, the evidence of Mr. Malhotra of PMTH that Galadari had told Mr. Hadi, the PMTH partner in charge of the audit, that Commodities was to be included as a division, the PMTH letter of 23rd March 1982 to Mr. Botha, the finance director of Holdings stating that PMTH had been told by Mr. Dhedi that Commodities was to be included as a division, and the fact that Galadari and Mr. Sami signed the Holdings' financial statements, is all acceptable audit evidence and is more than sufficient to support the inclusion of Commodities in the financial statements of Holdings at 31st March 1982.

Mr. Jackson the partner at Price Waterhouse who wrote the opinion has also given an interview before Mr. Filler, which we have also considered. He testified that, in his opinion the reference in audited financial statements that a company owns another company is not conclusive evidence and that other documentation should be looked at to establish legal ownership.

Spicer & Oppenheim were instructed by the Committee to provide an independent accountants report on the evidence available. This report is dated 21st June 1990 and the author of the report, Mr. Holden was cross-examined by counsel to Drexel in December 1990. Spicer & Oppenheim concluded that purely from an accounting point of view there was "no justification for the inclusion of Commodities

in the 1982 Holdings' consolidated accounts." They further concluded that "on the available evidence, it is more probable than not that Commodities was an independent private enterprise which was dealt with incorrectly in the preparation of consolidated financial statements for Holdings as at 31st March 1982. These conclusions were based largely on Spicer & Oppenheim's findings that "there was confusion over Commodities' status which PMTH did not satisfactorily explore" and that "there is no documentary evidence of any work done in establishing the background to the treatment adopted despite the unusual circumstances of the confirmation received during the previous year's audit." This was a reference to a telex dated April 15th 1981 from Holdings to Commodities asking that Commodities confirm direct to PMTH "our equity investment in A.W. Galadari Commodities as on 31st March 1981," which was replied to on the same day from Commodities to PMTH in the following terms: "We confirm that A.W. Galadari Holdings does not have any equity investment in A.W. Galadari Commodities."

The Committee concludes from the expert accounting reports together with the corroborating evidence of Mr. Malhotra that PMTH did not satisfy themselves that a change in ownership of Commodities had taken place, before including Commodities in the consolidated financial statements of Holdings on an equity accounting basis. Therefore the audited financial statements of Holdings as at 31st March 1982 cannot be accepted as conclusive evidence that an assignment of Galadari's interest in Commodities to Holdings actually took place. The Committee further agrees with Price Waterhouse that the failure of PMTH to so satisfy themselves is not conclusive of whether Galadari assigned his ownership interest in Commodities to Holdings as a matter of fact.

The Committee also has before it the opinion of Mr. Filler on the Commodities/Holdings issue. This opinion is not binding on the Committee and Mr. Filler was not instructed to render any opinion on this aspect of the case. However, the Committee has considered the evidence Mr. Filler obtained on this issue, in reaching their conclusions. The Committee has not found Mr. Filler's analysis of the issue and conclusion to be persuasive, relying as it does on the assumption that an assignment of Commodities to Holdings must have taken place because of the inclusion of Commodities in the Holdings' financial statements without examining whether such an assignment did, in fact, take place.

The Dubai firm of advocates and legal consultants A.R. Hilal & Associates at the Committee's request have advised the Committee by letters dated 13th April 1987, 17th September 1987 and 17th January 1988 regarding certain general principles of the law and practice of Dubai and other Arab countries. Mr. Salih of that firm also testified before Mr. Filler. A.R. Hilal & Associates have stated that the commercial law in Dubai does not directly specify the requirements of an assignment and in these circumstances that the law of other Arab countries to which Dubai Courts may look in determining relevant principles provide specific guidance in this matter. The Law of Contracts of such countries including that of Egypt, Syria, Libya, Iraq and Lebanon recognize the concept of assignment of a right which requires among other things an agreement between the assignor and the assignee and the existence of consideration of such assignment. In addition the law of these Arab countries provide special procedures regarding the transfer of shares and equities of companies. Such transfers must be in writing and registered in the appropriate registers and before the appropriate authorities.

The Committee notes that in Dubai, in 1982, transfers of businesses from one entity to another had to be registered with the Dubai Municipality and that in such circumstances it was necessary to obtain a new trade licence showing that change of onwership. However, new licences were only issued after publication of the proposed change in the local Dubai press inviting objections to such changes. There is no evidence before us that any change of ownership was registered or even applied for and in fact a new trade licence was issued for Commodities on 14th June 1982 still naming Galadari as the licencee.

A.R. Hilal & Associates have stated that the Shari'a recognises the concept of a gratuitous assignment or "Hiba". They indicate that in order to be valid under the Law of the Shari'a the Hiba must be in writing and attested by two witnesses. This aspect of Hiba is also supported by the Holy Curan. Furthermore, a Hiba is not final or definite but revocable at any time.

A.R. Hilal & Associates also advised us regarding the legal significance of trade licenses in determining ownership of licensed businesses under Dubai Law and practice. They have indicated that trade licenses are given considerable weight in determining ownership under Dubai Law and while the Dubai Shari'a Court may admit extrinsic evidence to the contrary in determining that question the Dubai Civil Court is "inclined to rule that trade licenses are official documents and oral evidence should not be allowed to contradict such documents."

Samir Saleh & Associates has rendered an opinion to the Committee at the request of Drexel dated 15th December 1987, in response to that of A.R. Hilal & Associates and two further opinions have been given in the course of 1988. They indicated that whether or not there was a formal legal "assign-

ment" of Galadari's ownership of interest in Commodities to Holdings there was a "defacto assignment". In this connection they stated "any purported challenge to this transaction based on the way in which the transfer was made (e.g. the lack of statutory authority in Dubai and other legal considerations) will not alter the reality of the transaction in three main respects:

- the nonexistence of Commodities as a corporate body;
- the actual transfer of funds;
- and the treatment of Commodities as a division of Holdings by the Holdings' Board.

Furthermore, in regard to the lack of direct statutory authority in Dubai recognising assignments, Samir Saleh & Associates contended: "the lack of statutory authority for assignments is not really the crucial question, rather that there is no statutory regulatory or judicial authority prohibiting assignments and that there is in fact daily practice of transfer of assignment of interest from one person to another in Dubai which cannot be challenged on the basis of scriptual sources."

While agreeing that "in strict Shari'a the concept of assignment of rights is not recognized and that in Shari'a transactions the parties, mainly in civil transactions, resort to transfer of debts or "Hawala", Samir Saleh & Associates asserted that "the business pressure in commercial transactions in Dubai, leaves the parties not to rely on Shari'a terms which are not contained in the scriptual sources of the Holy Quran and Hadith (the Prophet's practice)."

Finally, Samir Saleh & Associates indicated that the laws of Lebanon, Kuwait and Bahrain recognise the concept of assignment of a business. He emphasised however that it is the concept of assignment

of a business which is relevant here (as a corollary of the intermingling of assets of Commodities, a Division of Holdings, with Holdings' assets and not a specific and different administrative requirements in each country covering assignment by a written deed, a registration, publicity, etc.) which are obviously not applicable in Dubai since there is no statute law on the point."

Faced with these conflicting opinion, the Committee has preferred that of A.R. Hilal & Associates, they being lawyers practising in Dubai to that of Samir Saleh & Associates who do not practice law in Dubai and have based their opinion, at least to some extent, on information they have obtained from unnamed practitioners who, they say, have practised for a number of years in Dubai.

Evidence of the English law of assignment was also put before the Committee in the form of opinions from English lawyers, Messrs Freshfields and Simmons & Simmons. However, both A.R. Hilal & Associates and Samir Saleh & Associates did not consider it necessary in determining the issue of assignment to look to English law and therefore the Committee does not consider this evidence to be relevant to the issue of whether there was an assignment which was valid under Dubai law.

Drexel have argued that based on the documentary evidence that Commodities was a division of Holdings during the relevant period, it must be inferred that Holdings' ownership of Commodities was accomplished by a transfer of the Commodities business to Holdings and that the burden of proof is not on Drexel to show how Commodities became a division of Holdings. However, given the contradictory evidence before them, the Committee is of the opinion that Drexel does carry that burden. It is for Drexel to show that an assignment legally valid

under the law of Dubai of Galadari's ownership interest in Commodities to Holdings did take place betwene Galadari and Holdings. There is no evidence before the Committee either oral or documentary of any actual assignment. Certainly there is no evidence of an assignment legally enforceable under the law of Dubai. This would require a written agreement supported by consideration. There is no evidence of any such written agreement nor is there any evidence in the books of Holdings or elsewhere of any consideration being given for any purported assignment. Therefore Drexel have failed to discharge the burden of proving that such an assignment did actually take place.

The Committee therefore concludes upon a consideration of the record before it as a whole that Holdings is not, and never was legally responsible for any of the obligations of Commodities, including any claim by Drexel against Commodities.

4) Does Drexel hold a valid security over 6,068,640 shares of Class B stock of UBME of the Middle East Limited or the proceeds thereof?

As security for the obligations under the Promissory Note Galadari purported to pledge and turned over to Drexel International two share certificates numbered 7B and 10B representing 6,068,640 shares in UBME. The share certificates were printed in Arabic and no English translation was provided.

The face of one of the share certificates indicates that the registered owner of those shares is "Abdul Wahab Galadari Group of Companies Holdings Private Ltd." The face of the other share certificate indicates the registered owner is "Abdul Wahab Galadari Private Ltd."

On the face of each certificate there appears the legend that for the sale or assignment of the docu-

ment to any other person or establishment, to be effective, must be approved by the board of directors of UBME. This restriction however, does not preclude the pledge or deposit of the shares.

Galadari did not obtain the share certificates with the approval of the board of directors of Holdings, or was he authorised by the director of Holdings to pledge on deposit the share certificates with Drexel International.

At the time of the pledge the Central Bank of the United Arab Emirates, the federal regulator of all banking in the United Arab Emirates, had issued a directive prohibiting directors of UBME from trading or dealing in the shares of UBME. Galadari was, at the time a director of UBME and Drexel concedes that Galadari "may" have disobeyed the instructions of the Central Bank.

On 28th October 1982 Drexel International assigned the Promissory Note to Drexel and, at this time the share certificates were translated from Arabic to English.

In November 1983, a Provisional Board of Directors of UBME was appointed by the government of Dubai. Thereafter Drexel attempted to notify the Provisional Board of its security interest in the shares. However, such security interest was never registered. As part of the rehabilitation process of UBME, the government of Dubai purchased all shares in UBME previously owned by Holdings. The Decree provides that the proceeds of the shares but not the shares themselves would form part of the estate to be administered by the Committee.

There is no power in the Memorandum of Association of Holdings to enable Holdings to provide security for the existing debt of a third party.

Drexel claims to have a security interest in UBME shares, evidenced by the two certificates purportedly pledged to Drexel International by Galadari.

Article 2 of the Decree contains a definition of "Secured Debts":—

> "Secured Debts" means debts secured by Galadari Assets and/or assets owned by Galadari Companies and/or the Bank Shares. . . . as follows:-
>
> b) . . . . . if the security taken is:
>
> i) by way of a notarised mortgage document; and
>
> ii) the mortgaged assets are in the possession of the mortgagee; and
>
> iii) registered if capable of registration."

It is not disputed by Drexel that the pledge was not registered on the share register of UBME or any other register maintained by UBME for that purpose.

The Committee finds that the purported pledge of the shares was capable of registration with UBME and therefore the debt of Drexel is not secured as far as the receivership is concerned as it does not fall within the definition of "Secured Debts" in Article 2 of the Decree.

The Committee does not consider that the validity of the pledge in the receivership is governed by New York law. However, if the matter was by New York law the Committee would have accepted the analysis of the issue provided by Mr. Filler and Professor Speidel, both being U.S. lawyers who concluded that in their opinion the pledge would not be valid under New York law.

B. *Refco's Claim*

i) Was Refco's claim against Holdings timely?

Refco did not originally claim to be a creditor of Holdings. The Proof of Debt or Claim Form did not require them to.

For the reasons given above with regard to Drexel's claim, the Committee finds Refco's claim to rank as a creditor of Holdings to be timely.

ii) Should Refco's claim be admitted in whole or in part in the receivership?

The Committee has considered the Customer Agreement dated 24th March 1983 ("The Customer Agreement") between Refco and Commodities. There is some doubt as to whether this agreement is betwen Refco and Commodities or Refco and Galadari. However, it is signed by two employees of Commodities. Furthermore, ancillary documentation to this agreement is signed by Galadari apparently on behalf of Commodities.

On 6th July 1983 Galadari on behalf of himself and Commodities acknowledged a debt owing in the accounts of Commodiites with Refco, of US$ 6,109,664.20 as at that date. This balance was reduced by three payments of US$ 500,000 each on 19th September 1983, 18th October 1983 and 17th November 1983, to leave a final balance outstanding of US$ 4,609,664.20.

The Committee finds that the Customer Agreement was entered into betwen Refco and Commodities and that Commodities is liable for the debit balance outstanding in the accounts maintained under thc Customer Agreement.

The Committee has reconciled the books of Commodities with Refco's accounts. There is no evidence before the Committee that Refco in any way

acted improperly in the liquidation of the accounts of Commodities with Refco. Therefore the Committee finds for the purposes of the receivership and distribution of dividends only that Refco has a valid claim against Commodities in the receivership in the sum of US$ 4,609,664.20. The Committee further finds that Refco is entitled to interest on the reducing debit balance outstanding at the rate of interest contained in the Customer Agreement being the then current 90 day United States Treasury Bill rate from 6th July 1983 to 19th July 1984 and thereafter at a simple rate of interest of 9% per annum.

iii) Has Refco a valid claim against Holdings?

For the reasons given above in respect of Drexel's claim, the Committee finds that Holdings is not and never was legally responsible for any of the obligations of Commodities including any debts owed by Commodities to Refco.

In rendering this decision the Committee considers that all issues as between the Committee and Drexel and the Committee and Refco have been resolved and disposed of. This decision has, in pursuance of Article 12 (f) of the Decree, the effect of a judgement, and is, subject to the rights of the parties to appeal the decision to the Judicial Committee (as defined in the Decree), final and binding on the parties. In this regard the Committee notes that this decision may be appealed to the Judicial Committee within 30 days of the date of the decision.

Issued in Dubai on this Sunday, 14th day of April, 1991.

Signed:

1) Abdulla Hassan Al Rostamani

—Chairman /s/ Abdulla Hassan Rostamani

2) Abdullá Lootah

—Member /s/ Abdullá Lootah

3) Nabil Arif

—Member /s/ Nabil Arif

Supreme Court, U.S.
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(4)

No. 93-1389

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

REFCO, INC.,

Petitioner,

– against –

THE COMMITTEE OF RECEIVERS FOR A.W. GALADARI, and THE EMIRATE OF DUBAI, UNITED ARAB EMIRATES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Petitioner Refco, Inc. ("Refco") respectfully submits this brief in reply to the opposition briefs submitted by Respondents the Emirate of Dubai (the "Emirate") and the Committee of Receivers (the "Committee").

Refco's petition demonstrates that this Court should grant certiorari to review the Second Circuit's interpretations of the commercial activity and waiver exceptions under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602, *et. seq.* ("FSIA"), because the circuit court's interpretations are contrary to the plain language of §§ 1605(a)(1) and (a)(2). Refco respectfully refers the Court to the reply brief submitted by Petitioner The Drexel Burnham Lambert Group Inc. ("Drexel") (No. 93-1361). That brief fully addresses respondents' assertions with respect to the commercial activity and waiver exceptions to foreign sovereign immunity.

RESPONDENTS' "ALTERNATIVE GROUNDS" TO SUSTAIN THE SECOND CIRCUIT'S DECISION ARE WITHOUT MERIT

The Emirate raises a number of additional defenses to Refco's and Drexel's amended and supplemental complaints (Em. Br. at 20-26), none of which were addressed by the Second Circuit. PA 27a. None of these other defenses has any bearing on the reasons why this Court should review the Second Circuit's decision under the commercial activity and waiver exceptions under the FSIA. Moreover, each of the additional defenses are without merit.

A. The District Court Properly Rejected Respondents' Proffered Defense Under The Act Of State Doctrine.

The district court correctly found that the act of state doctrine is inapplicable here because the challenged acts were commercial in nature -- the repudiation of commercial debts -- rather than public in nature. PA 65a-68a, *citing Alfred Duhill of London, Inc. v. Cuba*, 425 U.S. 682 (1976).

The district court found the act of state doctrine to be inapplicable for the further reason that the challenged acts of respondents were not accomplished wholly within Dubai. The doctrine does not bar inquiry into the validity of a foreign

state's extraterritorial taking. *See, e.g., Banco Nacional de Cuba v. Chem. Bank N.Y. Trust*, 658 F.2d 903, 908 (2d Cir. 1981). The district court reasoned that because the situs of the debts is in the U.S., respondents' refusal to pay those debts did not occur within the borders of Dubai. PA 67a-68a. Refco's breach of contract and taking claims are not barred by the act of state doctrine for the further reason that these claims are based on significant conduct in the U.S., including promises in the U.S. with respect to the adjudication and payment of Refco's claims. Thus, an adjudication of Refco's (and Drexel's) claims would involve an examination of the Committee's U.S. acts, and not acts accomplished wholly within Dubai.

The Emirate misses the point in arguing that the act of state doctrine is applicable because petitioners' claims are based on acts which "*came to fruition*" in Dubai. Em. Br. at 21-22 (emphasis in original). Significant wrongful conduct on the part of respondents, including the Committee's promises to pay, occurred in New York. The Emirate also misplaces reliance on *Asociacion de Reclamantes v. United Mexican States*, 561 F. Supp. 1190, *aff'd*, 735 F.2d 1517 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1051 (1985). Em. Br. at 22. In that case, Mexico assumed responsibility for payment of plaintiffs' land grant claims. The only activity, or lack thereof, leading to plaintiffs' taking claims occurred wholly within the borders of Mexico. Unlike the instant case, plaintiffs in *Asociacion de Reclamantes* did not allege that the Mexican government engaged in any wrongful conduct in the U.S.

B. The District Court Properly Determined That The Committee Is Not Entitled to Quasi-Judicial Immunity.

The district court correctly determined that the Committee's claim of judicial immunity is unsupportable because it is the Committee's commercial activities, not purported quasi-judicial activities, which subject it to jurisdiction under the FSIA. PA 69a. In addition, the Emirate mischaracterizes Refco's claims in an effort to support its assertion that the "gravamen" of each claim is the Committee's improper "judicial" activities. Em. Br. at 22. To the contrary, respondents' liability does not arise from any purported quasi-judicial status of the Committee, but

rather from their status as successors to Galadari's debts and from the Committee's promises to Refco. Finally, respondents cannot assert judicial immunity from Refco's taking claim, which is based on adversarial, not "judicial," conduct by the Committee and the Emirate.

C. The District Court Properly Found That The Committee Is The Agent of The Emirate.

The district court correctly found that the Committee was created, and has at all times acted, as the Emirate's agent and, therefore, the jurisdictional contacts of the Committee may be attributed to the Emirate. PA 53a. The facts of the record amply support the district court's finding of a principal-agent relationship between the Emirate and the Committee. The Emirate seized Galadari's assets and took over the ownership of the Union Bank, thereby succeeding to all of Galadari's business interests. The Emirate vested the Committee with power to operate and dispose of the Galadari non-banking assets and to bring or defend legal proceedings. The record shows also that the Emirate agreed to approve any sale or other disposition of Galadari assets by the Committee; the Committee has no separate corporate or juridical existence and has been immunized by the Emirate for its conduct; the Committee has acknowledged that the Emirate has a "very substantial and direct interest in the conduct" of the Committee's proceedings; and the Committee has held itself out as acting on behalf of the Emirate since the inception of these actions. *See Banco Nacionale de Cuba*, 658 F.2d at 910-11. As the Emirate's agent, the Committee's voluntary appearance and waiver of immunity properly was attributed to the Emirate. PA 53a.

The Emirate contends that the district court erred because it did not make "factual findings" or discuss the principles of agency upon which the finding relied, whereas the Emirate showed that it "did not direct or control the Committee." Em. Br. 23. However, such direction or control to support a finding of an alter ego relationship is not relevant to the finding here of a principal-agent relationship. *See Lowendahl v. Baltimore & O.R. Co.*, 287 N.Y.S. 62, 74-75 (1st Dep't), *aff'd*, 272 N.Y. 360 (1936).

Even if an alter ego finding were necessary to establish that the jurisdictional contacts of the Committee are attributable of the Emirate, petitioners' amended pleadings and submissions to the district court set forth sufficient facts to support such a finding. In *First Nat'l City Bank v. Banco Para El Comercio*, 462 U.S. 611, 628-29 (1983) ("*Bancec*"), this Court held that an alter ego relationship can be found where the foreign state controls the instrumentality, the foreign state and its instrumentality are therefore "one and the same" and are treated as one juridical person. *See also American Int'l Group v. Islamic Republic of Iran*, 493 F. Supp. 522, 526 (D.D.C. 1980). Here, petitioners' complaints allege that the Emirate has retained control and authority over the Committee with respect to the assets and business affairs of Galadari. Under *Bancec*, an alter ego relationship may be found also where it would be inequitable not to do so. 462 U.S. at 630-34. Here, it would be inequitable to distinguish between the Emirate and the Committee. The Emirate appointed the Committee and sent it to defend the actions commenced by Refco and Drexel. The Committee's conduct resulted in a prejudicial delay of those actions and petitioners' non-payment. The principal beneficiary of the Committee's conduct is the Emirate. Allowing the Emirate to avoid jurisdiction under these facts, and where it could not have done so had it appeared on its own, would be inequitable.[1]

D. Refco's Claims are Not Barred Under § 1605(a)(5).

1. Refco's claims are commercial in nature and, therefore, are not encompassed by § 1605(a)(5). Section 1605(a)(5) applies only to "any case ... not otherwise encompassed in [§ 1605(a)(2)]." Therefore, under the plain language of the statute, where a claim falls within the commercial

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[1] It should be noted that, in both courts below, petitioners requested that, in the event the courts were to determine that the pleadings and the pre-discovery record were insufficient to support a finding that the Emirate is responsible for the Committee's acts, petitioners should be permitted to conduct discovery and submit further factual findings.

activity exception, subject matter jurisdiction exists and § 1605(a)(5) does not apply to bar a claim. *See, e.g., Walter Fuller Aircraft Sales, Inc. v. Republic of Philippines*, 965 F.2d 1875, 1889 (5th Cir. 1992). Refco's and Drexel's contract claims under § 1605(a)(2) and taking claims under § 1605(a)(3) thus are not barred as non-commercial torts under § 1605(a)(5).[2]

2. **Refco's claims are for breach of contract and taking, not, as the Emirate asserts, for the torts of misrepresentation, abuse of process or interference with contractual rights within the meaning of § 1605(a)(5)(B).** Em. Br. at 24. Refco's pleading sets forth elements for breach of contract: a promise upon which Refco relied to its detriment resulting in damage. Similarly, Refco alleges facts evidencing that its right to payment of a valid contractual debt was taken in violation of international law. That elements of a tort claim also may be present in a pleading does not preclude the plaintiff from bringing an otherwise valid contractual or taking claim. *Cf. Gregory Lumber Co. v. U.S.*, 9 Cl. Ct. 503, 525, *aff'd*, 831 F.2d 305 (Fed. Cir. 1987), *cert. denied*, 484 U.S. 1061 (1988) (addressing the Tucker Act, which contemplates jurisdiction over the U.S. arising out of a contract where the case "is not one solely sounding in tort," holding that "where an enforceable contract is alleged, an action for breach [is] not [a case solely sounding in tort] simply because elements of tort [are] present in the claim") (citation omitted); *accord Edwards v. U.S.*, 19 Cl. Ct. 663, 669 (U.S. Cl. Ct. 1990) (addressing the Federal Tort Claims Act (which parallels § 1605(a)(5)) and holding that "where privity of contract exists between the parties, there is a contract aspect to a claim for misrepresentation ... and subject matter jurisdiction exists") (citation omitted).

3. **Nor are Refco's contract and taking claims barred by the discretionary function exception under**

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[2] The Emirate also misplaces reliance on decisions under § 1605(a)(5) which address only non-commercial activity. *See, e.g., Gregorian v. Izvestia*, 871 F.2d 1515 (9th Cir.), *cert. denied*, 493 U.S. 891 (1989). Em. Br. at 24.

§ 1605(a)(5)(A). The Emirate fails to cite any authority which holds that claims properly pleaded pursuant to §§ 1605(a)(2) and (a)(3) may be barred under § 1605(a)(5)(A). Em. Br. at 24-25.

In any event, petitioners' claims are *not* premised upon an immune exercise of governmental discretion. The record demonstrates that the Committee exercised no discretion in adjudicating Refco's and Drexel's claims. The Committee merely executed the Emirate's determination to refuse payment for gambling debts. *See* PA 28a. In addition, § 1605(a)(5)(A) does not protect *all* acts of discretion. In *United States v. Gaubert*, 111 S. Ct. 1267, 1275 (1991), this Court recently analyzed the discretionary function exemption of the Federal Torts Claims Act and declared that the exemption does not protect all governmental actions, but only "decisions based on considerations of public policy." *See also Andrulonis v. U.S.*, 952 F.2d 652, 655 (2d Cir. 1991), *cert. denied*, 111 S. Ct. 2992 (1992) (citing *Gaubert*, the court held that one must focus on the "nature of the conduct" at issue in determining whether the conduct furthers the general policy behind the regulation).

In the court below, the Emirate asserted that the Committee's refusal to pay Refco and Drexel was grounded in the Emirate's policy to "create[] an orderly insolvency procedure ... in order to forestall financial catastrophe in Dubai and the surrounding region...." However, the "nature of the conduct" at issue is not based on the purposes the regulatory scheme seeks to accomplish. *See Andrulonis*, 952 F.2d at 655. The Committee, at the direction of the Emirate, engaged in conduct designed solely to frustrate Refco's valid right to payment. Such egregious conduct cannot be said to be grounded in the policy of the Emirate to create an orderly insolvency procedure.

E. Respondents Are Not Immune From Refco's Claims For Taking Refco's Property Rights In Violation Of International Law.

The Emirate argues that petitioners' taking claims do not meet the taking exception under § 1605(a)(3). The Emirate is wrong. In any event, even if the taking claims were found not to meet § 1605(a)(3), respondents still would subject to

jurisdiction under the commercial activity and waiver exceptions under the FSIA.

Refco's taking claim alleges that respondents wrongfully deprived Refco of its right to payment of a valid contractual debt. The appropriation was accomplished through the seizure of Galadari's assets and a campaign by the Emirate's representative, the Committee, to fabricate issues and manufacture evidence adverse to Refco so that Refco would not receive payment. The Emirate, as successor to the Union Bank, is the direct beneficiary of this campaign of appropriation. Refco thus states a claim against respondents for a taking in violation of international law. *See Banco Nacional de Cuba v. Chem. Bank N.Y. Trust Co.*, 822 F.2d 230, 237 (2d Cir. 1987); *West v. Multibanco Comerex, S.A.*, 807 F.2d 820, 825-26 (9th Cir.), *cert. denied*, 482 U.S. 906 (1987); *Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Ethiopia*, 616 F. Supp. 660, 663 (W.D. Mich. 1985).

The Emirate's assertion that respondents' conduct constituted mere "adjudication" of Refco's and Drexel's claims for payment, and not a "taking" of those claims (Em. Br. at 25) is belied by the facts. The record confirms that the denial of payment to Refco and Drexel was arbitrarily dictated by the Emirate. In 1991, the district court found that the record presented "no credible alternative" to the Committee but to pay Refco and Drexel from Holdings' funds. *Drexel v. Galadari*, 127 B.R. 87, 98 (S.D.N.Y. 1991). In addition, while the Emirate asserts that the denial of payment was not discriminatory, it is undisputed that the Emirate represents 90% of the monetary claims in the Galadari liquidation, and Refco's and Drexel's claims represent 97% of the admitted debt of Commodities.

Refco's taking claim also meets the nexus requirement of § 1605(a)(3). The property taken from Refco is controlled and operated by the Committee, which has engaged in commercial activity in the U.S. The debt is owed by Holdings and is within the Committee's custody and control, which has controlled and operated Holdings. The Committee repeatedly has stated that it has the funds to pay the contractual obligation,

and has continued the commercial activity of, *inter alia*, Holdings.[3]

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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[3] The Emirate concedes that Refco's taking claim is timely to the extent that it is premised on the Committee's 1991 actions. Em. Br. at 23 n.20. The Emirate argues, however, that Refco's claim is based, in part, on the issuance of Emiri decrees in 1983 and 1984 and, therefore, untimely. *Id.* This argument properly was rejected by the district court. PA 70a. Refco could not have maintained its taking claim until there was a wrongful taking without compensation in violation of international law, which did not occur until 1991. Refco's claims were asserted timely in February 1992. Moreover, the district court properly held that even if Refco's claim accrued in 1984, under the circumstances, respondents' conduct estops them to assert a statute of limitations defense. PA 69a-70a. *See, e.g.*, *Robinson v. Pan American World Airways, Inc.*, 650 F. Supp. 125, 127 (S.D.N.Y. 1986).